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Supreme Court of the United States

OCTOBER TERM, 1948

No. 47

LINCOLN FEDERAL LABOR UNION #19129, AMERICAN
FEDERATION OF LABOR, NEBRASKA
STATE FEDERATION OF LABOR, ET AL., APPEL-
LANTS,

vs.

NORTHWESTERN IRON AND METAL COMPANY,
DAN DIEBELHOUSE, STATE OF NEBRASKA AND
NEBRASKA SMALL BUSINESS MEN'S ASSOCIA-
TION

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA

FILED APRIL 22, 1948.

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vs.

NORTHWESTERN IRON AND METAL COMPANY; DAN DIEBELHOUSE, STATE OF NEBRASKA AND NEBRASKA SMALL BUSINESS MEN'S ASSOCIATION

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA

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[fols. 3-5] IN THE DISTRICT COURT FOR LANCASTER COUNTY,
NEBRASKA

LINCOLN FEDERAL LABOR UNION No. 19129; AMERICAN FEDERATION OF LABOR; Nebraska State Federation of Labor; and Henry Reichel, individually and as president of said Lincoln Federal Labor Union No. 19129, Plaintiffs and Representatives of a Class,

VS.

NORTHWESTERN IRON AND METAL COMPANY, A CORPORATION; Dan Giebelhouse; and State of Nebraska, Defendants and Representatives of a Class.

PETITION—Filed February 19, 1947

[fol. 6] Come now plaintiffs and for their petition against the defendants allege:

I

The Nature and Purpose of This Suit

This is a suit of a civil nature to obtain a declaratory judgment with respect to the interpretation, effect and legality of the so-called "Anti-Closed-Shop Amendment" to the Nebraska Constitution, and also to obtain certain equitable relief within the equity jurisdiction of the Nebraska courts. The rights, status and legal relations of the parties herein are affected by the adoption of such amendment to the Nebraska Constitution, and the rights, status, duties and obligations of such parties have been made uncertain and insecure by reason of such amendment, all as hereinafter more fully set forth. The purpose of this action is to obtain a declaration of the rights, status and legal relations of such parties under such amendment and, in addition, to obtain the equitable relief hereinafter more fully described.

The amendment in question, commonly called and hereinafter referred to as the "Anti-Closed-Shop Amendment," was adopted by vote of the people of the State of Nebraska on November 5, 1946, as an amendment to the Constitution of the State of Nebraska. Such law purports to prohibit any

form of union-shop provision in existing or future agreements between employers and employees. The term "union shop" or "union security agreement", as used in this petition, includes any and all agreements between employers and labor organizations or other representatives of employees wherein membership in a labor organization is required as a condition of employment.

The issues include the construction and validity of the [fol. 7] said amendment, as well as the constitutional rights of the plaintiffs and their constitutional immunities, and the rights and obligations of the parties hereto under said amendment; the rights, status and legal relations of the parties with respect to the union shop agreement herein involved; and the right of plaintiffs to the said equitable relief.

II

The Parties and the Controversy

1. At all times herein mentioned, the plaintiff American Federation of Labor was and now is a voluntary and unincorporated association composed of numerous voluntary and unincorporated associations or labor unions, including the plaintiffs Lincoln Federal Labor Union No. 19129 and Nebraska State Federation of Labor, the said affiliated associations having an aggregate membership of several million persons in all States of the United States, including the State of Nebraska, and in Canada, and all of said members are classified according to their various trades and industries into separate, voluntary and unincorporated associations of labor unions. The American Federation of Labor maintains its principal office in the City of Washington, District of Columbia, and William Green is its president.

2. At all times herein mentioned, the plaintiff Nebraska State Federation of Labor was and now is a voluntary and unincorporated association composed of numerous voluntary and unincorporated associations or labor unions, including the plaintiff Lincoln Federal Labor Union No. 19129, and including those known as national or international unions and their local union organizations affiliated with the American Federation of Labor, operating in the State of Nebraska. The Nebraska State Federation of Labor has its head-

quarters in the City of Omaha, State of Nebraska, and [fol. 8] John J. Guenther of that City is its president.

3. The American Federation of Labor and the Nebraska State Federation of Labor include among their affiliated organizations numerous local and national labor unions which have been designated and selected as collective bargaining representatives by a majority of employees of each of many employers in appropriate collective bargaining units in the State of Nebraska, and a large number of such local and national unions presently are parties to, or desire or are about to become parties to, various types of union-shop or union-security contracts with various employers throughout the State of Nebraska.

4. Such national and international labor organizations and their local union affiliates, affiliated with plaintiff American Federation of Labor and plaintiff Nebraska State Federation of Labor, have had for many years in the past, and have at the present time, large numbers of union-shop or union-security agreements with various employers in a large number of trades and industries throughout the United States and throughout the State of Nebraska. The use of union-shop or union-security agreements by such labor organizations is extremely widespread throughout the United States, as more specifically seen in an official publication of the United States Department of Labor known as Bulletin No. 829, entitled "Extent of Collective Bargaining and Union Status, January 1945," attached hereto as Exhibit "A" and made a part hereof as if specifically set forth at this point. Labor Organizations affiliated with plaintiff Nebraska State Federation of Labor, including plaintiff Lincoln Federal Labor Union No. 19129, have hundreds of union-security agreements embracing many thousands of employees engaged in various trades and industries throughout the State of Nebraska. Such agreements are with employers engaged in non-agricultural industries, trades and services. Some of these agreements [fol. 9] are with employers engaged in interstate commerce, and some are with employers engaged in intrastate commerce. Such labor organizations, as well as all other labor organizations which are a part of the American trade union movement, have traditionally entered into such union-shop agreements for purposes of security and protection and as

a means of achieving equality of bargaining power, and the union-shop status is a traditional subject matter of collective bargaining in Nebraska and throughout the United States and has been since the first days of the American trade union movement.

5. Plaintiffs American Federation of Labor and Nebraska State Federation of Labor bring this action on behalf of themselves and their affiliated labor organizations operating within the State of Nebraska, such labor organizations being too numerous to bring in as parties, the interest of such labor organizations, however, being similar; all as set forth at more length in paragraph 26 hereof.

6. At all times herein mentioned, the plaintiff Lincoln Federal Labor Union #19129 was and now is a voluntary, unincorporated association of employees employed in the iron and metal trade in and around Lincoln, Nebraska, and constitutes a local labor union. It is affiliated with the plaintiffs American Federation of Labor and Nebraska State Federation of Labor, as aforesaid. Its principal office is in the City of Lincoln, State of Nebraska. Its president is Henry Reichel of Lincoln, Nebraska.

7. At all times herein mentioned, the plaintiff Henry Reichel was and now is a citizen of the United States and a resident of the City of Lincoln, State of Nebraska; an employee of the defendant Northwestern Iron and Metal Company and included within the union-shop provisions of the contract referred to in paragraph 17 hereof; a member and [fol. 10] president of plaintiff Lincoln Federal Labor Union #19129; and an affiliated member of plaintiffs American Federation of Labor and Nebraska State Federation of Labor.

8. At all times herein mentioned the defendant Northwestern Iron and Metal Company was and is a corporation organized and existing under and by virtue of the laws of the State of Nebraska, engaging in the business of buying, selling, processing and otherwise dealing in iron and other metals and various products consisting in whole, or in part, of iron and other metals. At all of said times it has been and now is engaged in inter-state commerce, selling and shipping a substantial portion of its products to states other than Nebraska; procuring a substantial portion of its raw materials and other products used in its business from

states other than Nebraska; transporting said raw materials and other products from other states into Nebraska; delivering its finished products from Nebraska into other states by trucks, railways and other means of transportation; negotiating and completing the purchase of substantial amounts of raw materials and the sale of substantial amounts of its finished products in other states; engaging in said buying, selling, processing and dealing in iron and other metals and products for the direct and specific purpose of engaging in, and actually, substantially and directly engaging in and carrying on, business and commerce among the several states, and being subject to and operating under the National Labor Relations Act. In all of the aforesaid, and in all matters herein involved, the plaintiff Lincoln Federal Labor Union #19129, and all of the employees of defendant Northwestern Iron and Metal Company, were and are directly involved in and substantially engaged in said operations among the several states, being employees engaged and employed in interstate commerce.

9. The defendant Dan Giebelhouse is a resident of Lancaster County, Nebraska, and a former member of plaintiff [fol. 11] Lincoln Federal Labor Union #19129, as hereinafter more specifically alleged.

10. All plaintiff labor organizations herein named are organizations and associations of employees, including working men and women, in various trades, occupations and industries, who have from time to time assembled and associated together and are assembling and associating together for the purpose of organizing themselves into voluntary and unincorporated associations, for the purpose of forming, joining and assisting their organizations so formed, including the plaintiff labor organizations herein named, to bargain collectively through representatives of their own choosing, for purposes of mutual discussion and common consultation, and for dissemination of ideas and information to the membership and the general public, and to engage in concerted activities for the purpose of collective bargaining and otherwise dealing with their employers concerning hours of employment, rates of pay, working conditions or grievances of any kind relating to employment, and, in particular, the securing and obtaining of union-shop agreements providing for and insuring union

security and protection, all for their mutual aid and protection, and for the purpose, by these and other means, of protecting themselves and improving their working conditions, wages and employment relationships. All plaintiff labor associations are of the type commonly regarded and denominated as labor unions.

11. In the effectuation of their purposes, it is the necessary objective and practice of labor organizations, including the plaintiff labor associations and their affiliates, to negotiate and bargain with persons employing members of such organizations with respect to wages, hours and working conditions of the members of said unions and pertaining to other matters affecting or threatening the economic standards and the mutual welfare of the members of [fol. 12] said unions, and to arrive at mutual agreements embodied in collective bargaining contracts with said employers. The most important of such agreements are those containing union-shop or union-security provisions whereunder employees of such employers are required to become or remain members of a labor organization as a condition of employment. The obtaining of such provisions in collective bargaining agreements between labor organizations and employers now constitutes, and for over one hundred years has constituted, an ultimate objective of the association of working people, including the individual plaintiff herein, into labor organizations and of such organizations themselves, including the plaintiff labor organizations. The securing of such agreements is a necessary and indispensable concomitant of the assemblage of working people, including the members of plaintiff associations and the individual plaintiff herein, into labor organizations, and the right of labor associations, including plaintiff associations, to maintain and obtain such agreements, constitutes a necessary and indispensable element of their proper functioning and for the fulfillment of their purposes, as heretofore set forth.

12. Such union-shop or union-security agreements, including the collective bargaining agreement referred to in paragraph 17 hereof, and the right to enter into them constitute valuable property and civil rights in plaintiffs, for the following additional reasons: The union-shop or union-security agreement constitutes the most effective means of

obtaining and securing for plaintiff labor organizations and their members, including the individual plaintiff:

(1) Job security and protection from employer discrimination by removal of motives to discharge or demote because of union activity.

[fol. 13] (2) Equality of bargaining power, with consequent betterment of working conditions by insuring labor a united front in their endeavor for a fair share of the joint products of capital and labor.

(3) Protection of working standards by preventing cut-throat wage competition by non-union employees.

(4) Equality of sacrifice by insuring that all who enjoy union wages and working conditions, achieved through years of struggle and deprivation, share in the costs of such benefits as members of the union rather than as "free riders."

(5) An increased measure of union responsibility for their obligations under collective bargaining agreements by providing a means of imposing disciplinary action.

(6) Elimination of jurisdictional strife by safeguarding against raids and other disruptive tactics of rival labor organizations, and

(7) Labor-management cooperation by eliminating the suspicion and hostility which often characterizes the initial stages of employer recognition, thereby freeing union energies and resources for constructive cooperation rather than defensive sparring.

13. No labor organizations in the State of Nebraska, including the plaintiff labor organizations herein, exercise or have any monopoly or control by reason of any union-shop, closed-shop or union-security agreement over the supply of labor in any trade, craft, occupation or calling, either in the State of Nebraska generally or any city, community or place within such State.

14. Membership in the plaintiff labor organizations, as well as all other labor organizations operating in the State of Nebraska, is open to all qualified persons, and such organizations freely admit qualified applicants into member-

ship and impose no arbitrary or unreasonable requirements as a condition to membership or the continuation thereof. All of such labor organizations welcome and admit to their ranks all persons in the respective lines of work who can meet the requirements as to skill prescribed by such organizations and who will submit to the reasonable discipline [fol. 14] and by-laws of such unions and who are of good character and will agree to fulfill the contracts entered into by said unions.

15. All of the foregoing activities enumerated in the preceding paragraphs of this petition, and in particular the obtaining and maintaining of agreements containing union-shop or union-security provisions, as carried on by labor organizations and their members and by the plaintiffs in the present action and individuals represented by such plaintiffs, constitute the only effective means possessed by organized labor to accomplish economic security and otherwise deter the practices of employers which are destructive of public policy and of the interest of wage earners generally and of members of labor organizations and of plaintiff labor organizations herein, including the individual plaintiff, and said activities are indispensable concomitants of the right of employees to organize into labor organizations and to bargain collectively with employers and otherwise to advance their mutual interests and welfare.

16. Many employers in this state desire to maintain and obtain collective bargaining agreements with labor organizations containing provisions requiring membership in a labor organization as a condition of employment or other provisions relating to union security in that such provisions in collective bargaining agreements with labor organizations have resulted and result in stability of employment relationships, the promotion of harmony and cooperation as between employer and employees, the elimination of strife and discord both within the plant and as between rival labor organizations, the availability of sufficient skilled, competent and experienced artisans of the particular crafts, the stabilization of employees' compensation by the predetermination of applicable wage rates and the establishment of an effective means of increasing production. Many union shop agreements have existed in this state for a number of years, some [fol. 15] in continuous existence for more than fifty years.

All of these are by mutual agreement of the employers and employees and have been marked in their performance by harmony and the absence of industrial strife. There are numerous instances in Nebraska where an employer and all of his employees desire to retain a union shop or other form of union security agreement. The plaintiffs American Federation of Labor and Nebraska Federation of Labor are involved in a number of such situations, both with respect to employers engaged in interstate commerce and employers engaged in intrastate commerce.

17. On or about July 26, 1946, as the result of collective bargaining under the National Labor Relations Act, the defendant Northwestern Iron and Metal Company, a corporation, and the plaintiff Lincoln Federal Labor Union No. 19129, as a voluntary association subordinate to and chartered by the plaintiff American Federation of Labor, mutually and voluntarily made, executed and entered into a certain written collective bargaining contract, in consideration of the mutual promises, agreements, acts and benefits therein contained, a copy of said collective bargaining contract being attached hereto as Exhibit "B" and made a part hereof as if specifically set forth at this point. Said contract is in effect until July 26, 1947, and thereafter automatically renewable from year to year. In paragraph 3 thereof it is provided:

"Whenever any employee shall cease to be a member in good standing with the Union and when the Union shall have given written notice to the Company to that effect, the Company agrees to discharge said employee from its service at the end of the work week in which said notice of failure to maintain good standing in the Union is received."

18. The defendant Dan Giebelhouse was a member of the plaintiff Lincoln Federal Labor Union No. 19129 at the time of the making of said contract. He has been an employee of defendant Northwestern Iron and Metal Company at that [fol. 16] time and all times since, including the present time, employed as the operator of a lift-truck and loader and unloader, in the unit covered by said collective bargaining contract. On November 1, 1946, the defendant Dan Giebelhouse became delinquent in the payment of his dues to

plaintiff Lincoln Federal Labor Union No. 19129; has paid no dues since then and was suspended and ceased to be a member in good standing with said Union on February 1, 1947, and has not been a member in good standing with said Union at any time thereafter.

19. At no time has the employment of defendant Dan Giebelhouse been as a member of the office force, executive, foreman, employee having the right to hire or discharge, salesman or junk dealer buying or selling for the said Company outside of its plant or otherwise.

20. On February 10, 1947, the said plaintiff Lincoln Federal Labor Union No. 19129 gave written notice to the defendant Northwestern Iron and Metal Company, a corporation, that the said Dan Giebelhouse had ceased to be a member in good standing with said Lincoln Federal Labor Union No. 19129 and that he had been delinquent in his dues to said Union for the period of more than three months last past and stood suspended as a member of said Union; and said written notice further specifically asked that said Northwestern Iron and Metal Company discharge said employee from the service of said Company at the end of the work week in which said notice was received. The said work week ended at the close of February 14, 1947.

21. Upon receipt of said written notice on February 10, 1947, the defendant Northwestern Iron and Metal Company notified the plaintiff Lincoln Federal Labor Union No. 19129 that it refused to discharge the said Dan Giebelhouse and that it would not discharge said employee or any other employee under the provisions of its said written contract; [fol. 17] that it repudiated said section 3 of its contract and refused to perform it at any time and that the said section was null and void. Said defendant stated and continues to maintain that said section 3 is illegal and void under the provisions of the so-called "Nebraska Anti-Closed-Shop Amendment" to the Nebraska Constitution adopted November 5, 1946, and that it is unlawful for the parties to said contract to carry out the provisions of said section 3 or for the defendant Dan Giebelhouse to be discharged or for said provisions of the contract to be renewed.

22. In spite of the position of the plaintiff Lincoln Federal Labor Union No. 19129 that the said amendment is wholly

unconstitutional and void and that the said contract be respected and fulfilled and that the said Dan Giebelhouse be discharged, the said defendant Northwestern Iron and Metal Company has refused and still refuses to discharge him and continues to repudiate section 3 of said contract and to refuse to perform it. Said defendant continues to maintain said Dan Giebelhouse in its employ and threatens to continue to do so and to continue its violation of said contract, as hereinbefore alleged, all of which will cause irreparable damage to the plaintiffs.

23. The said Lincoln Federal Labor Union No. 19129 has performed all conditions of the said contract called for on its part, but the defendant Northwestern Iron and Metal Company has refused and continues to refuse to perform said contract, as aforesaid.

24. At the time said contract was entered into the plaintiff Lincoln Federal Labor Union No. 19129 was the representative of each and every employee embraced under said contract and the duly designated and selected and recognized bona fide exclusive bargaining representative chosen by all of said employees; and all of this applies at the [fol. 18] present time except as to said defendant Dan Giebelhouse. The unit embraced under the said collective bargaining agreement is and at all times has been appropriate for the purposes of collective bargaining. Prior to the time said agreement was entered into, the employees covered by such agreement were given an opportunity, through a meeting, to determine whether they desired to be included under a union-security agreement and the vote was unanimous for such inclusion and for the execution of this particular contract. All of the employees, with the exception of defendant Dan Giebelhouse, are desirous of maintaining and continuing said agreement with respect to union security.

25. The said contract and, in particular, the union-shop provisions thereof, constitute valuable property rights of the plaintiffs and the members of the plaintiff associations. Under and by virtue of such agreements and the union-security provisions thereof, the plaintiffs, employers and the general public have realized and are realizing many benefits and advantages, including those enumerated in paragraphs 10 through 16, supra.

26. The members of the plaintiff labor organizations, including plaintiff Henry Reichel, and the officers, agents and employees of said organizations and the individual members of such organizations and of all other organizations of employees and all other labor organizations affiliated with plaintiffs American Federation of Labor and Nebraska State Federation of Labor having members who are residents of the State of Nebraska and being organized for the purpose of dealing with employers concerning hours of employment, rates of pay and working conditions, constitute a class situated similarly to the plaintiff labor organizations and the individual plaintiff with respect to the matters herein alleged and are so numerous as to make it impossible or impractical to bring them all before this Court, but the rights and interests of all of such class with respect [fol. 19] to the things and matters in this petition alleged are fairly represented by the plaintiffs herein, and these plaintiffs have heretofore been authorized to represent the members of said class with respect to the matters in this petition alleged and to bring this suit for and on behalf of themselves and all such other organizations affiliated with the American Federation of Labor or with the Nebraska State Federation of Labor, and organizations, persons and individuals similarly situated. Plaintiff labor organizations and plaintiff Henry Reichel bring this suit on behalf of themselves and as representative of the interests and rights of the class hereinbefore described in this paragraph.

27. The State of Nebraska is made a party to this suit under the provisions of the Nebraska Declaratory Judgments Law because of the fact that this suit involves the question of constitutionality of said amendment to the Constitution of the State of Nebraska.

28. The refusal or failure of employers, including defendant Northwestern Iron and Metal Company, to perform provisions of their contracts relating to union security in collective bargaining agreements will cause immediate and irreparable injury and damage to plaintiff labor organizations who are parties to such agreements, including the individual plaintiff and other members of such organizations; in that the benefits and advantages under such agreements will be lost and disruption to production will inevit-

ably result if there is any failure to continue to observe the union-security provisions of such agreements.

29. Other employers, besides Northwestern Iron and Metal Company, with whom the plaintiffs American Federation of Labor and Nebraska Federation of Labor have collective bargaining agreements containing union-security provisions have also taken the position that the said "Anti-[fol:20] Closed-Shop Amendment" is applicable and effective, and there is threatened throughout the State of Nebraska a breakdown in the processes of collective bargaining, multiplicity of litigation, unsettling of amicable relationships between employers and employees, industrial strife and disruption of interstate and intrastate commerce, all to the irreparable injury of the plaintiffs, other labor organizations and individuals similarly situated and employers and the general public.

30. Cancellation or repudiation of existing contracts or refusal to renew or enter into such contracts by employers, including defendant Northwestern Iron and Metal Company, because of the said "Anti-Closed-Shop Amendment" will deprive the plaintiffs and others similarly situated of the benefits, advantages and privileges of mutual association and assembly and of the mutual obligations heretofore assumed by members of such organizations in such mutual association and assembly. It will deprive the plaintiffs and all members of the plaintiff labor organizations of the benefits, rights, privileges and immunities heretofore received and now possessed under contracts made by plaintiff labor organizations and by and among the members thereof, and will prevent such plaintiffs and all members of the plaintiff labor organizations from engaging in all of the activities hereinbefore set forth and from securing the benefits, objectives and purposes of their mutual association and assembly as hereinabove set forth, and will irreparably injure and eventually destroy the plaintiff labor organizations. It will interfere with and prevent and cause a cessation and denial of collective bargaining relations by the plaintiff labor organizations and all others in the State of Nebraska similarly situated, and interfere with and prevent the renewal and continuance of contracts and agreements now in effect between the plaintiff labor organizations and employers, including contracts which by their terms provide

[fol. 21] for automatic renewal. It will cause plaintiff labor organizations and others similarly situated to lose present and prospective members and to lose considerable finances because of an inevitable decrease in amount of dues collected, will imperil the security of such labor organizations and their members, and will prevent plaintiffs and others similarly situated from enjoying the benefits of the National Labor Relations Act and from achieving an equality of bargaining power. Such acts will imperil and destroy the process of collective bargaining in the State of Nebraska and will inevitably interfere with and disrupt both interstate and intrastate commerce in wide areas of the State. Such acts will imperil and disrupt harmonious relationships existing between plaintiffs and others similarly situated and employers, all to the irreparable injury of plaintiff labor organizations, their members, including plaintiff Henry Reichel, and others similarly situated and of employers and the general public.

31. That by reason of all the foregoing, there has arisen a grave question and an actual controversy concerning the rights, status and legal relations of the parties to the collective bargaining agreement hereinbefore set forth and other similar agreements, and as to the right of plaintiffs and others similarly situated to enter into or renew agreements containing union-security provisions, including said agreement attached hereto as Exhibit "B"; that the rights, status, duties and obligations of the parties to all such agreements have been made uncertain and insecure by reason of the said Anti-Closed-Shop Amendment and the facts herein alleged; that it is necessary to obtain an adjudication from this Court setting forth the rights, status, duties and obligations of such parties with respect to such agreements and with respect to renewals thereof and future agreements in order to avoid widespread confusion, disruption and interference with constitutional rights, particularly with respect [fol. 22] to the rights, status and legal relations of the parties growing out of the collective bargaining agreement attached to this petition as Exhibit "B"; that there exists an actual and immediate controversy between the parties to the said agreement as to the validity of the said contract and as to the meaning, construction, application, operation, legality and constitutionality of the said Anti-Closed-Shop

Amendment; that the plaintiffs have no adequate remedy other than as prayed for in the suit at bar.

III

The Anti-Closed-Shop Amendment

32. On November 5, 1946, there was submitted to the voters of Nebraska, by initiative petition, the following proposed amendment to the Constitution of the State of Nebraska:

"A Measure"

For an Amendment to the Constitution of the State of Nebraska prohibiting the denial of employment to any person because of membership or non-membership in a labor organization and prohibiting any contract requiring denial of employment because of membership or non-membership in a labor organization; defining "labor organization" and providing that said proposed amendment be self-executing.

"Be it Enacted by the People of the State of Nebraska: That the Constitution of Nebraska be amended by the addition of the following article:

"Section 1.

No person shall be denied employment because of membership in or affiliation with, or resignation or expulsion from a labor organization or because of refusal to join or affiliate with a labor organization; nor shall any individual or corporation or association of any kind enter into any contract, written or oral, to exclude persons from employment because of membership in or non-membership in a labor organization.

"Section 2.

The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, which exists for the purpose, [fol. 23] in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

"Section 3.

This article is self-executing and shall supersede all provisions in conflict therewith; legislation may be enacted to facilitate its operation but no law shall limit or restrict the provisions hereof."

33. The said proposed amendment was adopted by vote of the people of the State of Nebraska, voting at said general election on November 5, 1946. On December 12, 1946, the Governor of the State of Nebraska, issued an official proclamation setting forth that the proposed amendment had received a majority of the votes cast on the question of its adoption and that the affirmative votes were not less than thirty-five percent of the total votes cast at the election. Said proposed amendment, under the laws of the State of Nebraska, immediately became effective and operative, upon the issuance of such proclamation, as a law of the State of Nebraska, and as an amendment to the Constitution of the State of Nebraska. Such law is commonly known as the "Anti-Closed-Shop Amendment" as aforesaid.

34. The said law is intended and purports to make unlawful the continuation in effect or the entering into of any provision of any collective bargaining agreement between any labor organization and any employer in the State of Nebraska, whereunder union membership is required as a condition of employment.

IV

Manner in Which Said Law Violates the Federal Constitution and Deprives Plaintiffs of Rights Guaranteed There-
Under and Reasons Why Inoperative

35. Plaintiffs herein and others similarly situated believe and assert that the said purported law hereinbefore referred to and known as the "Anti-Closed-Shop Amendment" is void, unenforceable, unconstitutional and of no legal effect [fol. 24] whatsoever for the following reasons, to wit:

(1) Said purported law prevents individuals and members of labor organizations, including the individual plaintiff and other individual members of the plaintiff labor organizations herein, from accomplishing the ultimate purpose and objective of such individuals

in assembling and associating together into labor organizations and in exercising the rights of speech, press and petition while so assembled, or as a part of such assemblage, and thereby denies, impairs and previously restrains the exercise by such individuals and organizations of their rights of assembly, speech, press, and petition guaranteed under the First Amendment to the United States Constitution as protected against invasion by the State by the Fourteenth Amendment. Enforcement of the said law will deprive the plaintiffs of the benefits and privileges of mutual association and assembly and of the mutual obligations heretofore assumed by members of the plaintiff organizations in such mutual association and assembly as guaranteed by such First Amendment, and would impair and restrain the exercise of the rights alleged in this petition all in violation of the said First Amendment.

(2) Said purported law impairs and invalidates any provision in any collective bargaining agreement between any employer and any labor organization which provides that membership in such labor organization shall be a condition of employment and, in particular, invalidates and impairs the obligations of the existing contracts entered into by the plaintiffs prior to the time such amendment became effective, as hereinbefore specifically set forth, and further, said alleged law makes inoperative, ineffective and invalid, and otherwise impairs the obligations and agreements mutually and voluntarily assumed by and among members of labor organizations, including plaintiff labor organizations and their members, all in violation of Article I, Section 10, of the Constitution of the United States providing that no State shall make laws impairing the obligations of contracts.

(3) Said purported law prevents labor organizations and their members, including plaintiff labor organizations and their members and the individual plaintiff herein, from discussing, negotiating, bargaining for, and entering into or renewing mutually agreeable collective bargaining agreements containing union-shop or union-security provisions with employers engaged

in either interstate or intrastate commerce, including the parties to this case, and from using such union-shop or union-security agreement as a means of achieving security, protection and an equality of bargaining power, and prevents such employers from discussing, negotiating, bargaining for, renewing or entering into [fol. 25] mutually agreeable bargaining agreements, and thereby such law has withdrawn a very important and traditional subject matter of collective bargaining from the subject matters concerning which employers are under a duty to bargain under the National Labor Relations Act. Such law has and will in the future precipitate labor disputes and disturbances which have and will interrupt the free flow of, and otherwise affect, commerce among the States, all in conflict with the provision of the National Labor Relations Act, Title 29, Sections 151 to 166, U. S. Code Annotated, and violative of the public policy and law of the United States with respect to employers or employees engaged in interstate commerce or engaged in occupations affecting interstate commerce as laid down in Section 151 of said Code. Such law is in conflict with and violates and seeks to abrogate rights and privileges conferred on employees, members of labor organizations, and labor organizations, including the individual plaintiff and the plaintiff labor organizations and their members, by Sections 157, 158 and 159 of said Code aforesaid, and it is in conflict with, violates and seeks to abrogate duties and obligations imposed upon employers under such National Labor Relations Act, particularly Section 158 thereof, all in violation of Article VI of the United States Constitution providing that the laws of the United States shall be the supreme law of the land.

(4) The said purported law prevents labor organizations and employers, including the parties to this case, from negotiating, entering into, carrying out and renewing mutually agreeable collective bargaining agreements containing union-shop or union-security provisions, or requiring employees to become and remain members of labor organizations as a condition of employment, and thereby deprives such labor organizations and their members, including the plaintiffs, and

employers, of property rights and liberties secured, protected and guaranteed against infringement by the States under the Fourteenth Amendment to the United States Constitution, and in particular of the right and liberty freely to contract, protected as a property right under the due process clause of the Fourteenth Amendment to the United States Constitution. The said alleged law denying plaintiffs their liberties and civil and property rights, as heretofore set forth, is arbitrary and unreasonable and constitutes an improper and unlawful exercise by the State of Nebraska of its police power. Said law is without rational basis, is not justified by existing circumstances, and is not in the public interest. It imposes hardships in disproportion to any possible public benefit, and the interests of the public generally are not such as to require or justify the enactment of said law. For the foregoing reasons the said law is in violation of the Fourteenth Amendment to the United States Constitution.

[fol. 26] (5) The said purported law, by prohibiting agreements between labor organizations and employers which contain union-shop or union-security provisions, discriminates against the class of members of labor organizations, and in particular against plaintiff labor organizations and their members and the individual plaintiff herein, on the one hand, and in favor of non-members of labor organizations on the other. Such alleged law constitutes class legislation passed in the interest of the class of non-union employees and not in the interest of the public generally. The said law is further discriminatory in that it prohibits labor organizations alone out of all other classes of organizations, societies or voluntary associations established for the purpose of bringing cultural, social, economic or spiritual benefits to their members, from attempting by voluntary arrangement to require all who obtain the benefits of union activity to contribute to the support and maintenance of that union, and this in spite of the fact that such unions are required, under federal law with respect to interstate industries, to distribute benefits achieved through the process of collective bargaining equally to all employees within the bargaining

unit and to represent all within such unit on the same basis regardless of whether such employees are or are not union members. Accordingly, such purported law is in violation of the provisions of the Fourteenth Amendment to the United States Constitution requiring that no State shall deny any person within its jurisdiction the equal protection of the laws.

V.

Prayer

Wherefore plaintiffs pray:

1. That the Court determine and declare the said collective bargaining agreement, Exhibit "B", to be valid and enforceable in all respects.
2. That the Court determine and declare the said Anti-Closed-Shop Amendment to be unconstitutional and void under the Constitution of the United States.
3. That the Court determine and declare the rights, status and other legal relations of the plaintiffs and defendants with respect to the said contract, including the renewal thereof, and with respect to the said purported amendment and all other matters set forth in this petition.
4. That the Court order the defendant Northwestern Iron [fol. 27] and Metal Company to forthwith specifically perform the said contract in all of its provisions and to discharge the defendant Dan Giebelhouse from its employ.
5. That the Court enjoin the defendant Northwestern Iron and Metal Company from continuing the defendant Dan Giebelhouse in its employ.
6. That the costs of this suit be taxed against the defendants.
7. That such other, further and different relief be granted to the plaintiffs as may be just and equitable.

Joseph A. Padway, Herbert S. Thatcher, Bernard S. Gradwohl, Attorneys for Plaintiffs.

Duly sworn to by John J. Guenther. Jurat omitted in printing.

[fol. 28]

PRAECIPE

To the Clerk of the District Court for Lancaster County,
Nebraska:

Please issue summons in this suit and deliver the same
to the Sheriff of Lancaster County, Nebraska, for service
upon the defendants in the manner provided by law.

Joseph A. Padway, Herbert S. Thatcher, Bernard S.
Gradwohl, Attorneys for Plaintiffs.

[fol. 29]

EXHIBIT "A" to PETITION

United States Department of Labor

Frances Perkins, Secretary

Bureau of Labor Statistics

Isador Lubin, Commissioner (on leave)

A. F. Hinrichs, Acting Commissioner

Extent of Collective Bargaining and Union Status

January 1945

Bulletin No. 829

For sale by the Superintendent of Documents, U. S.
Government Printing Office, Washington 25, D. C., Price
5 cents.

[fol. 29a]

Letter of Transmittal

United States Department of Labor,

Bureau of Labor Statistics,

Washington, D. C., April 9, 1945.

The Secretary of Labor:

I have the honor to transmit herewith a report on the
extent of collective bargaining and union status in effect in
January 1945. This study is based on an analysis of ap-
proximately 15,000 employer-union agreements as well as
employment, union membership, and other data available
to the Bureau of Labor Statistics.

This study was prepared under the general supervision of Florence Peterson, Chief of the Industrial Relations Division. Elizabeth Stark and Philomena Marquardt were in immediate charge of assembling the data.

A. F. Hinrichs, Acting Commissioner.

Hon. Frances Perkins, Secretary of Labor.

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Check-off arrangements	9
[fol. 29b] Bulletin No. 829 of the United States Bureau of Labor Statistics	

[Reprinted from the Monthly Labor Review, April 1945, with Additional Data]

Extent of Collective Bargaining and Union Status, January 1945¹

Union Agreement Coverage

Some 14 $\frac{1}{3}$ million workers were employed under collective-bargaining contracts in January 1945. An analysis by the Bureau of Labor Statistics indicates that these workers included approximately 47 percent of all workers employed in industries and occupations in which unions are actively engaged in obtaining written agreements with employers.² During the year 1944 there was an increase in

¹ For similar data for previous years see Monthly Labor Review, April 1944, February 1943, May 1942, and March 1939.

² It is estimated that approximately 30 $\frac{1}{4}$ million workers were employed in occupations in which unions are actively engaged in organizing and seeking to obtain written agreements. In most industries this includes all wage and salary workers except those in executive, managerial, and certain types of professional positions. It excludes all self-employed, domestic workers, agricultural wage workers on

agreement coverage of over half a million workers, which was equivalent to a 4.5-percent rise in the proportion of employed workers covered by agreements.

Manufacturing.—Approximately 65 percent (more than 8¾ million) of all production wage earners³ in manufacturing industries were employed under the terms of union agreements at the beginning of 1945, representing an increase during the year of 8 percent in the proportion of employees working under union agreements.

The largest increases in the proportion of workers under agreement were in the tobacco and chemical industries and, to a less extent, in the canned and preserved foods industry. Agreements were negotiated for the first time with several large aircraft and petroleum-refining companies, as well as with a number of meat-packing, shoe, leather-tanning, and rubber companies.

The degree of union organization at the beginning of 1945 varied considerably among the manufacturing industries, although not so much as among nonmanufacturing industries and trades. Over 90 percent of the production wage earners were working under union agreements in the aluminum, automobile, basic steel, brewery, fur, glass, men's clothing, rubber, and shipbuilding industries, in contrast to only a little more than 10 percent in the dairy-products industry.

farms employing fewer than 6 persons, all Federal and State government employees, teachers, and elected and appointed officials in local governments.

It should be noted that the number of workers covered by union agreements is not the same as union membership. Except under closed- or union-shop conditions, agreements cover nonmembers as well as members employed within the given bargaining unit. On the other hand, some union members may be working in unorganized plants and many civil-service employees and teachers are members of unions but are not employed under the terms of bilateral written agreements.

³ Clerical, professional, service, and construction workers, foremen, and truck drivers connected with manufacturing are treated as occupational groups under nonmanufacturing employees.

[fol. 29c]

Proportion of Wage Earners Under Union Agreements in January 1946

MANUFACTURING INDUSTRIES

80-100 percent	60-80 percent	40-60 percent	20-40 percent	1-20 percent
Agricultural equipment. Aircraft and parts. Aluminum. Automobiles and parts. Breweries. Carpets and rugs, wool. Cement. Clothing, men's. Clothing, women's. Furs and fur garments. Glass and glassware. Meat packing. Newspaper printing and publishing. Nonferrous metals and products. Rubber products. Shipbuilding. Steel, basic. Sugar, beet and cane.	Book and job printing and publishing. Clocks and watches. Coal products. Electrical machinery, equipment, and appliances. Leather tanning. Machinery and machine tools. Millinery and hats. Paper and pulp. Petroleum refining. Railroad equipment. Rayon yarn. Tobacco products. Woolen and worsted textiles.	Baking. Canning and preserving foods. Dyeing and finishing textiles. Flour and other grain products. Furniture. Gloves, leather and cloth. Hosiery. Jewelry and silverware. Knit goods. Leather luggage, handbags, novelties. Lumber. Pottery, including chinaware. Shoes, cut stock and findings. Steel products. Stone and clay products.	Beverages, nonalcoholic. Chemicals, excluding rayon yarn. Confectionery products. Cotton textiles. Paper products. Silk and rayon textiles.	Dairy products.

NONMANUFACTURING INDUSTRIES

Actors and musicians. Airline pilots and mechanics. Bus and street car, local. Coal mining. Construction. Longshoring. Maritime. Metal mining. Motion-picture production. Railroads—freight and passenger, shops and clerical. Telegraph service and maintenance. Trucking, local and intercity.	Radio technicians. Theater—stage hands, motion-picture operators.	Bus lines, intercity. Light and power. Newspaper offices. Telephone service and maintenance.	Barber shops. Building servicing and maintenance. Cleaning and dyeing. Crude petroleum and natural gas. Fishing. Hotels and restaurants. Laundries. Nonmetallic mining and quarrying. Taxicabs.	Agriculture. ¹ Beauty shops. Clerical and professional, excluding transportation, communication, theaters, and news papers. Retail and wholesale trade.
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¹ Less than 1 percent.

[fol. 29d] *Nonmanufacturing.*—About 33 percent (slightly more than 5½ million) of all nonmanufacturing workers were employed under the terms of union agreements at the beginning of 1945, representing an increase during the year of 6 percent in the proportion of employees working under agreement.

Over 95 percent of the coal-mining, maritime and longshoring, and railroad employees, including clerical and supervisory personnel, and over 90 percent of the employees in the iron-mining and telegraph industries were employed under union agreements.

Nearly 25 percent of the employees in service occupations and slightly less than 20 percent of the clerical and professional employees were under union agreements. A major portion of the clerical and professional workers in the transportation, communications, and public utilities industries and practically all actors and musicians were employed under collective-bargaining agreements. In manufacturing, financial, and business service establishments, and in wholesale and retail trade, only about 13 percent of the clerical and professional employees were under agreement.

Union Status

General Types

The union-status provisions in employer-union agreements can be classified into five general types according to their union-membership requirements and privileges, as well as to the presence or absence of check-off arrangements. The various degrees of union recognition or union security are commonly referred to as closed shop, union shop with or without preferential hiring of union members, maintenance of membership, preferential hiring with no membership requirements, and sole bargaining with no membership requirements. Check-off arrangements are of two kinds, usually referred to as automatic check-off and check-off by individual authorization.

Under closed-shop agreements all employees are required to be members of the appropriate union at the time of hiring, and they must continue to be members in good standing throughout their period of employment. Most of the closed-shop agreements require employers to hire through the union unless the union is unable to furnish suitable persons

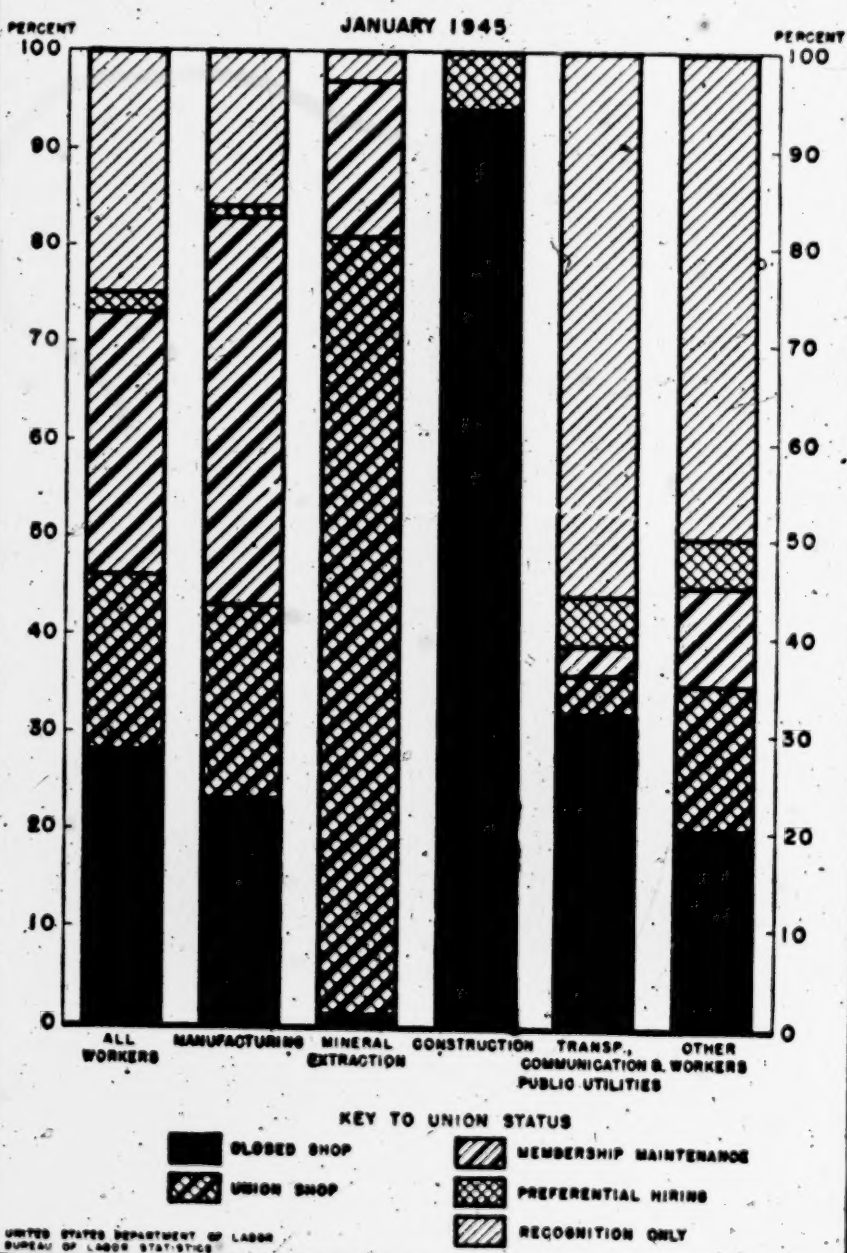
within a given period, in which case the persons hired elsewhere must join the union before starting to work.

In contrast to closed-shop agreements, a union-shop agreement provides that employers have complete control over the hiring of new employees and such persons need not be union members when hired. They must, however, become members within a specified time, usually 30 to 60 days, as a condition of continued employment. When a union-shop agreement, in addition to requiring that all employees join the union within a specified probationary period, states that union members shall be given preference in hiring, it differs very little in effect from the closed-shop agreement. In a few cases, employees hired before a closed- or union-shop agreement is signed are exempt from the union-membership requirement.

A maintenance-of-membership agreement requires all employees who are members when the agreement is signed, and all who choose later to join the union, to retain their membership for the duration of the agreement. The

(Here follows, 1 photolithograph, side folio 29c)

**PROPORTION OF WORKERS UNDER
UNION AGREEMENT
BY UNION STATUS PROVIDED
MAJOR INDUSTRY GROUPS**



[fol. 29f] maintenance-of-membership, provisions established by order of the National War Labor Board allow 15 days during which members may withdraw if they do not wish to remain members for the duration of the agreement.

Some agreements provide for preferential hiring without union-membership requirements. In other words, union members must be hired if available; but otherwise the employer may hire nonmembers and such persons need not join the union as a condition of continued employment.

Some agreements include no membership requirements as a condition of hiring or continued employment. The union is recognized as the sole bargaining agent for all employees in the bargaining unit and is thus responsible for negotiating the working conditions, under which all workers are employed, including those who do not belong to the union. This type of agreement, unlike the others, does not enable the union to rely on employment per se to maintain or increase its membership.

Extent of various types of union-status provisions.—Although the proportion of workers under closed- and union-shop clauses remained about the same, the proportion under maintenance-of-membership clauses continued to increase during 1944. By January 1945, approximately 27 percent ($3\frac{3}{4}$ million) of all persons employed under union agreements were employed under maintenance-of-membership clauses, an increase during the year of almost 23 percent in the proportion of workers under such agreements. About 28 percent (4 million) of all workers under agreement were employed under closed-shop provisions and about 18 percent ($2\frac{1}{2}$ million) under union-shop agreements. (About 7 percent of the latter were covered by agreements which also specified that union members should be given preference in hiring.) Only 2 percent of all workers under agreement were covered by union preferential clauses, whereas 25 percent were under agreements which provided recognition only.

The proportion of workers under agreement covered by various types of union status in January 1945 is shown by chart 1, for major industry groups. All clerical, professional, and service workers are included in the group "other workers." All trucking and warehousing workers are included in "transportation, communication, and public utilities." Except for these occupational groups, workers

have been included in the industry in which they are employed:

















































































Manufacturing.—In January 1945, closed-shop provisions covered approximately 23 percent of all workers under manufacturing agreements, and union-shop agreements 20 percent—or together a total of about 3¾ million workers. Of the union-shop agreements, about 10 percent also provided that union members should be given preference in hiring. Most of the wage earners under agreement in the bakery, brewery, men's and women's clothing, and printing and publishing industries were employed under closed- or union-shop clauses. Substantial proportions of those under agreement in the hosiery and canned and preserved foods industries, and a majority of those under agreement in the paper, shoe, shipbuilding, and silk and rayon industries, were working under closed- or union-shop provisions.

About 3½ million workers in manufacturing industries were employed at the beginning of 1945 under maintenance-of-membership clauses. They included 40 percent of all

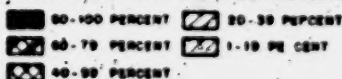
(Here follow 2 photolithographs, side folios 29g, 29h)

PROPORTION OF WORKERS UNDER UNION AGREEMENT BY UNION STATUS IN SELECTED INDUSTRIES AND OCCUPATIONS

JANUARY 1945

INDUSTRY	CLOSED SHOP	UNION SHOP	MEMBERSHIP MAINTENANCE	PREFERENTIAL HIRING	RECOGNITION ONLY
AGRICULTURAL EQUIPMENT					
AIRCRAFT & PARTS					
ALUMINUM					
AUTOMOBILES & PARTS					
BAKING					
BREWERIES					
BUS & STREETCAR, LOCAL					
CANNED & PRESERVED FOODS					
CHEMICALS, EXCLUDING RAYON YARN					
CLERICAL & PROFESSIONAL OCCUPATIONS					
CLOTHING (MEN'S)					
CLOTHING (WOMEN'S)					
COAL MINING					
CONSTRUCTION					
COTTON TEXTILES					
ELECTRICAL MACHINERY & APPLIANCES					
GLASS & GLASSWARE					
HOSIERY					
LEATHER TANNING					
LIGHT & POWER					
MACHINERY & MACHINE TOOLS					
MARITIME & LONGSHORING					

PROPORTION OF WORKERS UNDER AGREEMENT

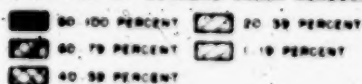


UNITED STATES DEPARTMENT OF LABOR
BUREAU OF LABOR STATISTICS

PROPORTION OF WORKERS UNDER UNION AGREEMENT BY UNION STATUS IN SELECTED INDUSTRIES AND OCCUPATIONS JANUARY 1945

INDUSTRY	CLOSED SHOP	UNION SHOP	MEMBERSHIP MAINTENANCE	PREFER-ENTIAL HIRING	RECOGNITION ONLY
MEAT PACKING					
METAL MINING					
NONFERROUS ALLOYING, ROLLING & DRAWING					
NONFERROUS SMELTING & REFINING					
PAPER & ALLIED PRODUCTS					
PETROLEUM & COAL PRODUCTS					
POTTERY & CHINAWARE					
PRINTING & PUBLISHING					
RAILROADS					
RAILROAD EQUIPMENT					
RAYON YARN					
RUBBER PRODUCTS					
SERVICE OCCUPATIONS					
SHIPBUILDING					
SHOES, CUT STOCK & FINDINGS					
SILK & RAYON TEXTILES					
STEEL - BASIC					
STEEL PRODUCTS					
TELEPHONE					
TOBACCO PRODUCTS					
TRUCKING & WAREHOUSING					
WOOLEN & WORSTED TEXTILES					

PROPORTION OF WORKERS UNDER AGREEMENT



UNITED STATES DEPARTMENT OF LABOR
BUREAU OF LABOR STATISTICS

[fol. 29i] workers under manufacturing agreements, representing an increase of about 14 percent during the year in the proportion employed under such agreements. The greatest increase over the previous year in the proportion working under maintenance-of-membership clauses occurred in the non-ferrous-metals alloying, rolling and drawing industry (from less than 15 percent to over 50 percent), but there were very substantial increases in the machinery and machine-tool, nonferrous-metals smelting and refining, tobacco, woolen and worsted textile, and electrical-machinery industries. At the beginning of 1945 maintenance-of-membership clauses covered most of the employees under agreement in the basic steel industry, a substantial proportion of those in the agricultural and railroad equipment and meat-packing industries and a majority of those under agreement in the aluminum, automobile, electrical-machinery, machinery and machine-tool, rubber, tobacco, woolen and worsted textile industries and in the nonferrous-metals alloying, rolling, drawing, smelting and refining industries.

Only about 1 percent of all manufacturing workers under agreement were employed under preferential-hiring provisions with no union-membership requirements. In only one manufacturing industry, pottery, were such clauses common.

About 16 percent of the workers under agreement in all manufacturing industries were employed in plants which recognize the union as sole bargaining agent but do not require union membership as a condition of hiring or continued employment. In the rayon-yarn industry slightly more than half of those under agreement were covered by such clauses and between a third and a half of those in the cotton textile, petroleum and coal products, nonferrous-metals alloying, rolling, and drawing, aircraft, and glass industries.

Nonmanufacturing.—Approximately 36 percent of all workers under agreements in nonmanufacturing industries and occupations were covered by closed-shop provisions and about 16 percent by union-shop provisions—a total of more than 2 $\frac{3}{4}$ million workers. Only a few of the union-shop agreements also provided that union members should be given preference in hiring. The closed shop was provided in almost all agreements in building con-

struction and trucking and in many of the agreements covering service and trade employees such as barbers and employees in building service, laundry, dry cleaning, and food establishments. Coal miners and a majority of the organized bus and street-railway employees were under union-shop agreements.

About 6 percent of the nonmanufacturing workers under agreement were employed under membership-maintenance clauses. The greatest increase over the previous year in the proportion working under such clauses occurred in wholesale and retail trade, metal mining, and crude petroleum and natural gas; in the two last-named industries the majority of the employees were covered by such clauses.

Only 4 percent of all nonmanufacturing workers under agreement were employed under agreements with preferential-hiring provisions but no union-membership requirements. Only in maritime and longshoring are such clauses common.

About 38 percent of the workers under agreement in all nonmanufacturing industries and occupations were employed under contracts which recognized the union as sole [fol. 29j] bargaining agent but included no membership requirements. More than half of these workers were employed in the railroad industry, where virtual union-shop conditions prevail, although the agreements do not provide for union-shop arrangements.

Check-off Arrangements

During 1944 there was an increase of about 28 percent in the proportion of workers under agreements who were covered by some form of check-off provisions. Almost 6 million workers, or more than 40 percent of all employees under agreements, were covered by check-off provisions in January 1945. About half were covered by clauses providing for the automatic check-off of all members' dues and the other half by clauses which provide for check-off only for those employees who file individual written authorizations with the employer. Under some of the latter agreements the authorizations, once made, continue in effect for the duration of the agreement; under others they may be withdrawn whenever the employee desires. (If working under a closed- or union-shop or maintenance-of-membership agreement, however, the employee must personally pay his

dues to the union if he cancels his check-off.) Although most of the check-off clauses provide that all dues and assessments levied by the union shall be collected, some specify "regular dues only" or check-offs not to exceed a given amount.

Manufacturing.—Almost 4½ million workers, or more than half of all workers under agreement in manufacturing industries, were employed at the beginning of the year under agreements which provide for check-off. Slightly fewer manufacturing workers were covered by automatic check-off arrangements than by provisions for check-off upon individual authorization.

During 1944 the proportion of workers under check-off arrangements increased about 38 percent. Most of the increase in the proportion under agreement with check-off arrangements took place in shipbuilding, although there were considerable increases in the railroad-equipment and nonferrous-metals alloying, rolling, and drawing industries. Over 90 percent of the workers under agreement in the basic steel, railroad-equipment, and hosiery industries were covered by check-off provisions, and the great majority of those in the cotton-textile, meat-packing, nonferrous-metals alloying, rolling, and drawing, shipbuilding, silk and rayon textile, and woolen and worsted textile industries.

Nonmanufacturing.—About 1½ million, or 26 percent of the workers employed under agreements in nonmanufacturing industries, were covered by some form of check-off arrangement. Most of these check-off clauses, including those covering coal miners, specify that the employer is to deduct the union dues and assessments from the wages of all members. The agreements for about a third of the non-manufacturing employees covered by check-off clauses provided for check-off only upon authorization of individual employees.

[fol. 30]

EXHIBIT "B" TO PETITION

Agreement

This agreement made and entered into this 26th day of July, 1946, by and between the Northwestern Iron and Metal Company, a corporation with its principal place of business in Lincoln, Nebraska, by its officer or officers duly

authorized and empowered to bind said corporation, hereinafter referred to as the Company and the Lincoln Federal Labor Union #19129, a voluntary association, subordinate to and chartered by the American Federation of Labor, by its officers duly authorized and empowered to act for and in its behalf, hereinafter referred to as the Union.

For and in consideration of the mutual covenants contained herein the parties to this agreement hereby agree to the following provisions, to wit:

1. That this contract shall be in effect and binding upon the parties hereto from and after the date of signing until July 26, 1947 and thereafter from year to year, unless one party or the other gives notice in writing to the opposite party at least thirty days prior to the expiration of the agreement that it does not want to renew the agreement or that it proposes certain changes therein. If a new agreement cannot be reached within the thirty days, then the existing agreement shall be automatically extended for a period of not more than an additional thirty days during which the negotiations shall be continued before the United States Conciliation Service. But it further provided that either party desiring to change or modify this agreement shall, in writing, set out in full a proposal of said changes, to the other party, and if said other party shall accept said changes, then said changes shall become binding upon both parties at any time mutually agreed upon from the date of [fol. 31] said acceptance, but this time interval shall not exceed thirty days from the date of said approval.

2. Except as further provided in section three below, the Company agrees to employ none but members of the Union in good standing in all departments used by the Company in the conduct of its business, except further that this provision shall not include members of the office force, executives and foremen, and those employees that have the right to hire and discharge, and shall not include salesmen and junk dealers buying and selling for the Company outside of the plant of the Company.

3. If the union is not in a position to supply a sufficient number of competent employees, the Company may hire non-union employees provided however, that the non-union employees thus hired shall not be objectionable to the Union as ascertained during the first two weeks of their

employment by the Company and that all such new help, either union or non-union members, hired by the Company shall be allowed to work for two work weeks in order to ascertain if they are satisfactory to said Company and at the end of the second work week if said employee is satisfactory then said employee shall make or shall have made application to join said Federal Labor Union #19129 and said new employee shall be informed of this requirement by the Company at the time of entering such service. At the end of the second work week of said new employee, the Union agrees to admit such new employee into membership in the Union, provided that all of the conditions hereinbefore specified shall have been complied with. Whenever any employee shall cease to be a member in good standing with the Union and when the Union shall have given written notice to the Company to that effect, the Company agrees to discharge said employee from its service at the end of the work week in which said notice of failure to maintain good standing in the Union is received.

[fol. 32] 4. The Company and the Union, after an intensive, detailed study of the problem of reclassification of hourly-paid employees, have agreed to the job classifications and basic rates of pay therefore as shown on "Schedule A" hereto annexed and made a part hereof. The increased rates shown on said schedule shall be effective as of July 26, 1946, and shall continue during the period of this contract and shall be submitted to any Governmental agency which, by an executive order, or by Act of Congress, is required to approve such wage changes.

The Company will confer with the Union should any dispute arise as to the classification of an individual employee and should the parties be unable to agree, the matter shall be considered a grievance subject to the procedure herein provided for the adjustment thereof.

Grade advancements will continue to be made by the Company substantially in accordance with the present practice.

5: It is mutually agreed that the day work shall be performed between the hours of 7 a. m. and 6 p. m. Night work shall be performed between the hours of 6 p. m. and 7 a. m. Time begins and ends with employee at his station or place

of actual work. All overtime will be allowed only if time card is O.K.ed by foreman in charge.

6. It is mutually agreed that all work performed by any member of the Union in excess of eight hours in any one day (or night) and in excess of forty hours in any one week, shall be compensated for at time and one-half his regular hourly rate. No employee shall be paid both daily and weekly overtime for the same hours so worked. The following days are hereby declared to be holidays: Sundays and the following six legal holidays: Memorial Day, July 4th, Labor Day, Thanksgiving Day, Christmas Day, New Years Day, or days celebrated as such. All work performed on such holidays or days celebrated as such shall be paid [fol. 33] for at the rate of time and one-half the regular rate and such overtime shall be in addition to any overtime paid for work for the stipulated work week. However, it is understood that no employee may be paid for the same holiday twice in one calendar year. (Such as for Sunday work when a holiday occurs thereon but is celebrated on the Monday following.)

The Employer agrees that no work will be performed on Christmas Day, New Year's Day and July 4th. Employees shall be paid for such holidays at their regular rate of pay.

7. All employees of the Company within the terms of this agreement shall receive a vacation with full pay for one week, provided he or she shall have been in the service of the Company for period of not less than forty work weeks during the last year and such vacation period shall be fixed by the Company and pay for the same shall be given in advance of the time of the commencement of the vacation period of each employee. All employees with three or more years service shall receive two weeks vacation with pay.

8. It is mutually agreed that there shall be no strikes, lockouts, picketing or other similar interruptions of work during the life of this agreement, except such as provided for in provision eleven of this agreement.

9. The Company shall have the right to change any employee from one department to another, either temporarily or permanently. However, any and all employees' seniority shall hold good regardless of what department he or she may be working in. Employees shall not be sub-

jected to any reduction of rates by virtue of transfers from one classification to another or from one department to another which are of a temporary nature, except by mutual agreement of the Company and the Union i.e. (Employee [fol. 34] taught job of higher pay rate and receives higher pay rate as long as he is on that temporary advancement but reverts back to original pay when that job is completed.

10. In making promotions the Company agrees that senior employees who are competent shall be given preference. In the matter of layoffs, the oldest employees in terms of seniority, and competent to fill the available positions shall be retained. Seniority of workers shall be the relative status of employees in a department in respect to length of service with the company. Length of service shall be the total service with the Company excluding any service prior to a quit or discharge. Should any controversy regarding seniority arise, the matter shall be submitted to arbitration as provided herein.

11. No employee shall be required to report for work unless he shall be paid at least two hours pay.

12. The company and Union agree that the wage question may be opened after a thirty-day notice has been submitted by either party.

13. The Union shall appoint a committee of not less than three nor more than five from among its members employed by the employer who shall act as the Grievance Committee. There shall not be more than one member of this committee from any particular department.

14. All Building Construction work shall be done by the Lincoln Building and Construction Trades Council affiliated with the American Federation of Labor.

Should any difference arise between the Employer and the Union or between the Employer and any of its employees covered by this contract, there shall be an earnest effort to settle such difference through the following procedure in the order named:

(1) By a conference between the foremen of the Department [fol. 35] a member of the union grievance committee, and the employee or employees involved.

(2) By conference between the union grievance committee and the Vice-President of the Company in charge of operations or his designated assistant.

(3) By conference between an American Federation of Labor representative and the President of the Company.

(4) If the difference is not adjusted by the above procedure, it shall be referred to a Board of Arbitration. The Board of Arbitration shall consist of two members to be selected by the Employer and two members to be selected by the Union. If a majority of these members cannot arrive at a decision within forty-eight hours after the first meeting, they shall select a fifth member within three days (Sundays and holidays excluded) after the expiration of forty-eight hours. If they cannot agree upon the fifth member within this time, the fifth member shall be appointed by the Director of the Conciliation Service of the United States Department of Labor. A decision of a majority of the Board of Arbitration shall be final and binding upon all parties to this agreement.

Unless the Employer shall have failed to comply with the decision of the Board of Arbitration, there shall be no lockout by the Employer.

Each representative of the Union officially designated and recognized by this agreement who loses time, during his working hours, in handling grievances in the manner provided in this agreement shall receive pay therefore at his average earned rate, computed on the basis of his previous pay period and without the inclusion of overtime earnings.

The Employer agrees to maintain files of applicants for positions and to judge qualifications solely upon merit—physical, mental, moral, personal, etc., and experience as [fol. 36] determined by the Personnel Department and Executive concerned jointly. These files shall be open to inspection and review by the members of the Grievance Committee of the Union whenever a worker files a Grievance in writing with the Union, provided that only file cards subject to such review by said Committee shall be those of the alleged aggrieved person and the person or persons contributory thereto.

In all cases where the Union or a member thereof submits a cause for Grievance in writing, the alleged Grievance

shall be taken before the Company in the manner provided by the terms of this agreement in not over thirty days after the cause of the complaint occurred.

In witness whereof we have hereunto attached our signatures this 2nd day of August, 1946.

Northwestern Iron & Metal Company, by D. Hill, President; Lincoln Federal Labor Union #19129, by Harry Brehm, by A. P. Kildow, by Henry Reichel, by Patrick McCartney, American Federation of Labor Representative. Witnesses: Leo Hill, F. L. Duckworth.

[fol. 37]

Schedule A

Crew Chief

\$.05 per hour above highest rate in crew.

Iron Yard Department

Crane Operator

\$1.05 per hour

Welder and Tool Repairer

1.15 per hour

Tin Baler Operator

.93½ per hour

Cutting Torch Operator

Base 4 weeks

8 weeks

3 months

80

85

90

.93½ per hour

Shear Operator

Base

4 weeks

83½

88½ per hour

Iron Sorter

.83½ per hour

Common Labor and Baler Helpers

Base

4 weeks

8 weeks

3 months

73½

75

77

78½ per hour

Metal Processing Department

Metal Sorters

\$.93½ per hour

Metal Sorters' Helper

.88½ per hour

Metal Unloaders and Laborers

Base

4 weeks

8 weeks

3 months

73½

75

77

78½ per hour

Metal Baler and Shear Operator

.83½ per hour

Furnace Tenders for Metal Foundry

Base

4 weeks

8 weeks

3 months

78½

83½

85½

88½ per hour

Cupola Tapper

.95 per hour

Lift Truck Operator

Base

4 weeks

80

85

Paper and Rag Department

Paper and Rag Sorters - Women

Base

4 weeks

8 weeks

55

60

63½ per hour

Paper and Rag Baler Operator

.90 per hour

Paper Operator Supplier

.90 per hour

Paper Bale Helper

.83½ per hour

Shipping and receiving clerk

.88½ per hour

All employees on the second shift shall receive five cents (5¢) per hour extra as premium pay.

[File Endorsement Omitted]

[fol. 38] IN THE DISTRICT COURT FOR LANCASTER COUNTY

[Title omitted]

PETITION OF INTERVENTION OF NEBRASKA SMALL BUSINESS
MEN'S ASSOCIATION—Filed April 2, 1947

Comes now the Nebraska Small Business Men's Association and shows the Court that it has an interest in the matter in litigation in this suit and in the success of the defendants and against the plaintiffs in this action, which interest is more fully shown by the following facts:

1. This Intervenor is a non-profit corporation organized and existing under and by virtue of the laws of the State of Nebraska. Its membership consists of more than 250 individuals, partnerships and corporations who are engaged in business in the State of Nebraska. Its members are located in some twenty-five cities in twenty-four counties scattered throughout the State of Nebraska. The members of the Intervenor have various numbers of employees, some employ as few as half a dozen employees, and some employ several hundred employees. Some such members are engaged in interstate commerce and are subject to the National Labor Relations Act, and others are not. Some such members have and some have not [fol. 39] collective bargaining agreements with labor unions; and of those who have such agreements, some have had, until the effective date of the so-called "Anti-Closed-Shop Amendment" or "Right-to-Work Amendment," union-shop or maintenance-of membership agreements, and some have never had such agreements.

2. The constitutional amendment set forth in Paragraph 32 of the plaintiffs' petition and referred to by some as the "Anti-Closed-Shop Amendment" and by others as the "Right-to-Work Amendment," and which the plaintiffs ask this Court to declare unconstitutional and void, was proposed by this Intervenor. Signatures to the petitions which placed said amendment on the ballot were obtained by this Intervenor. Intervenor was a defendant in a suit by which plaintiffs attempted to keep said amendment from being voted on by the electorate, and said litigation was defended by this Intervenor and by the Attorney General of the State of Nebraska.

3. Because of the fact that this Intervenor was instrumental in bringing about the adoption of said "Right-to-Work Amendment," and the fact that Intervenor's members are employers who have been and are being subjected by labor unions to demands for union-shop contracts under threat of strike and boycott, Intervenor has a special interest in upholding the validity of said constitutional amendment.

Wherefore, this Intervenor prays that the Court enter an order making it a party defendant to this action, and that it be given leave to file herein the motion to strike, submitted herewith.

Nebraska Small Business Men's Association, by
Swarr May Royce Smith & Story and Ralph W.
Slocum, Its Attorneys.

[fol. 40] *Duly sworn to by Edson Smith. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 41] IN DISTRICT COURT OF LANCASTER COUNTY

[Title omitted]

MINUTE ENTRY—April 4, 1947

This cause now comes on to be heard on motion of intervenor Nebraska Small Business Men's Association to strike certain portions from the plaintiff's petition filed herein, and is argued and submitted.

IN DISTRICT COURT OF LANCASTER COUNTY

[Title omitted]

ORDER OVERRULING DEFENDANTS' OBJECTIONS, ETC.—
April 9, 1947

Objections of defendants Northwestern Iron and Metal Company, and Dan Giebelhouse to petition of intervention

of Nebraska Small Businessmen's Association are on this day overruled by the Court and said Nebraska Small Businessmen's Association given leave to file petition in intervention and motion to strike instanter.

[fol. 42]

[File endorsement omitted]

IN THE DISTRICT COURT FOR LANCASTER COUNTY

[Title omitted]

DEMURRER—Filed May 7, 1947

Comes now the State of Nebraska, one of the defendants in the above cause, and hereby demurs to the petition of the plaintiffs filed herein for the reason that said petition fails to state facts sufficient to constitute a cause of action against the defendants.

State of Nebraska, Defendant; by Walter R. Johnson, Attorney General; by Robert A. Nelson, Assistant Attorney General; Edward R. Burke, Special Assistant Attorney General, Its Attorneys.

[fol. 43]

[File endorsement omitted]

IN THE DISTRICT COURT FOR LANCASTER COUNTY

[Title omitted]

MOTION OF NEBRASKA SMALL BUSINESS MEN'S ASSOCIATION
FOR JUDGMENT ON THE PLEADINGS—Filed May 7, 1947

Comes now the Nebraska Small Business Men's Association, intervening defendant, and moves the Court to enter judgment in its favor and against the plaintiffs upon the pleadings heretofore filed in this case, to-wit, upon plaintiff's petition, for the reason that the facts well pleaded in said petition do not entitle plaintiffs to any of the relief prayed for, but, on the contrary, such facts, together with the facts of which this Court takes judicial notice, show that the so-called Right-to-Work or Anti-Closed-Shop Amendment is valid, and that the Union Shop contract set

forth in plaintiffs' petition is therefore invalid and unenforceable.

Wherefore, this intervening defendant prays that the Court enter its judgment finding, declaring, and adjudging as follows:

f. That the said Right-to-Work or Anti-Closed-Shop Amendment, set forth in Paragraph 32 of plaintiffs' petition, is constitutional and valid.

[fol. 44] 2. That Paragraph 3 of the collective bargaining agreement attached to plaintiffs' petition as Exhibit "B," set forth at Paragraph 17 of plaintiffs' petition, is invalid and unenforceable by reason of said constitutional amendment.

3. That the costs of this suit be taxed against the plaintiffs.

Nebraska Small Business Men's Association, Intervening Defendant, by Swarr May Royce Smith & Story and Ralph W. Slocum, Its Attorneys.

Copy sent to Atty. Gen., copy mailed to Finkelstein, copy handed to Gradwohl, May 6, 1947. Ralph W. Slocum.

[fol. 45] [File endorsement omitted]

IN THE DISTRICT COURT OF LANCASTER COUNTY

[Title omitted]

MOTION OF NORTHWESTERN IRON AND METAL COMPANY AND DAN GIEBELHOUSE FOR A JUDGMENT ON THE PLEADINGS—
Filed May 8, 1947.

Come now the Northwestern Iron and Metal Company and Dan Giebelhouse, defendants in the above entitled action and each by its and his attorney move the court to enter a judgment in favor of each of said moving defendants and against the plaintiffs upon the pleadings filed in this case and upon the plaintiffs' petition for the reasons that the allegations of fact well pleaded and set out in said petition do not entitle the plaintiffs to any of the relief prayed for, but the allegations of fact well pleaded and set

forth in said petition together with the facts of which this court takes judicial notice clearly shows that pursuant to said facts and the law applicable, the Amendment to the Constitution of the State of Nebraska which was adopted by the people of the State of Nebraska on November 5, 1946, and which Amendment the governor of the State of Nebraska proclaimed, received a majority of the votes cast, is constitutional, binding and in full force and effect from and after the 12th day of December, 1946, the date of said proclamation by said governor. The said Amendment, which is set forth in full in Paragraph 32, Pages 15 and 16 of the plaintiff's petition, is valid and binding, and that the [fol. 46] said Amendment does not contravene any part of the Constitution of the United States nor the National Labor Relations Act, and that by reason of said Constitutional Amendment of the State of Nebraska Paragraph 3 of the contract entered into by and between the plaintiff, Lincoln Federal Labor Union #19129 and the defendant, Northwestern Iron and Metal Company, on July 26, 1946, is, since the 12th day of December, 1946, illegal, invalid and unenforceable.

Wherefore these moving defendants move that the court enter a judgment in this case declaring, finding and adjudging that:

1. The said Amendment to the Constitution of the State of Nebraska adopted by the vote of the people of said State on November 5, 1946 and proclaimed by the governor to be in full force and effect on December 12, 1946, and fully set forth in Paragraph 32, Pages 15 and 16 of plaintiffs' petition is valid and binding and does not contravene any provisions in the Constitution of the United States of America.

2. That the said Constitutional Amendment of the State of Nebraska does not contravene and does not deny to the plaintiffs the rights guaranteed in the First Amendment to the Constitution of the United States.

3. That the said Constitutional Amendment of the State of Nebraska does not contravene and does not deny to the plaintiffs, the rights guaranteed by Article 1, Section 10 of the Constitution of the United States.

4. That the said Constitutional Amendment of the State of Nebraska does not contravene and does not deprive the

plaintiffs of any of the rights guaranteed to said plaintiffs in the National Labor Relations Act, Title 29, Sections 151-166, inclusive, United States Code Annotated, and does not violate the public policy and laws of the United States, but, [fol. 47] on the contrary, is fully in harmony with the spirit and purpose of said National Labor Relations Act and with the public policy and laws of the United States to prevent any sort of discrimination in employer and employee relationships.

5. That the said Constitutional Amendment of the State of Nebraska does not contravene and does not deny any of the rights guaranteed to the plaintiffs in Article VI of the Constitution of the United States.

6. That the said Constitutional Amendment of the State of Nebraska does not contravene and does not deny to the plaintiff any of the rights guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

7. That the said Constitutional Amendment of the State of Nebraska does not constitute class legislation, but is all inclusive to all employers and employees of said state.

8. That Paragraph 3 of the contract entered into by and between the plaintiff, Lincoln Federal Labor Union # 19129 and the defendant, Northwestern Iron and Metal Company, which is set forth in Paragraph 17, Page 9 of the plaintiffs' petition, is, since the 12th day of December, 1946, illegal, invalid and unenforceable by reason of the adoption of said Amendment to the State Constitution by the people of the State of Nebraska.

9. That the costs of this suit be taxed against the plaintiffs.

Northwestern Iron and Metal Company and Dan Giebelhouse, Defendants, by Louis W. Finkelstein,
Their Attorney.

[fol. 48] IN DISTRICT COURT OF LANCASTER COUNTY

LINCOLN FEDERAL LABOR UNION No. 19129; AMERICAN FEDERATION OF LABOR; Nebraska State Federation of Labor; and Henry Reichel, individually and as President of said Lincoln Federal Labor Union No. 19129, Plaintiffs,

VS.

NORTHWESTERN IRON AND METAL COMPANY, A CORPORATION; Dan Giebelhouse; and State of Nebraska, Defendants, and Nebraska Small Business Men's Association,

Intervening Defendant

DECLARATORY JUDGMENT—July 7, 1947

This matter came on to be heard on the 26th day of May, 1947, upon the petition of the plaintiffs, the demurrer of the State of Nebraska, the motion for judgment on the pleadings of the defendants, Northwestern Iron and Metal Company and Dan Giebelhouse, and the motion for a judgment on the pleadings of the intervening defendants, Nebraska Small Business Men's Association; all parties were represented in court by their counsel; the matter was submitted to the court upon the oral arguments of the counsel and upon their written briefs.

On the 13th day of June, 1947, in open court, all parties hereto being present by their counsel, the court finds and determines that the demurrer and the motions for judgment on the pleadings admit all of the facts in said petition which are well pleaded; the court further finds that the issue presented by the demurrer and the motions for judgment on the pleadings is the validity, under the Constitution and [fol. 49] Laws of the United States, of the constitutional amendment adopted by the electors of the State of Nebraska, at the general election held on the 5th day of November, 1946, and the court being well advised in the premises, finds and determines that said amendment is valid and a proper exercise of the police powers of the State, and that, therefore, the said demurrer and the said motions for judgment on the pleadings should be sustained.

That the plaintiff's counsel announced in open court that plaintiffs would not amend their petition or plead further, but would stand upon their petition as heretofore filed.

It Is Therefore Declared, Ordered, Adjudged, and Decreed:

1. That the objective of the said amendment now designated as Sections 13, 14 and 15 of Article XV of the Constitution of the State of Nebraska, is to prevent the denial of employment to any person because of membership in or affiliation with, or resignation or expulsion from a labor organization or because of refusal to join or affiliate with a labor organization; that the terms of said amendment are no broader than necessary to carry out its objective; that the terms of said amendment, make unlawful and void, from its effective date, December 12, 1946, any closed shop, union shop, or maintenance of membership agreement, insofar as applicable to employment in Nebraska, regardless of whether such agreement was executed before or after said effective date;

2. That the particular phase of employer-employee relations covered by said amendment has a definite relationship to the public welfare; and is subject to the police power of the state; that said amendment is not unreasonable, arbitrary or capricious; that the means selected have a real and substantial relation to the object sought to be attained by said amendment;

[fol. 50] 3. That said amendment does not violate or conflict with any provision of the Constitution of the United States of America;

4. That the said amendment to the Constitution of the State of Nebraska does not conflict with, impair, violate, or contradict, any provision of the National Labor Relations Act nor the Labor Management Relations Act, 1947, and does not deprive the plaintiffs of any of the rights guaranteed to said plaintiffs by the said Acts;

5. That said amendment is in all respects valid;

6. That by reason of said amendment, the union shop provisions of the collective bargaining agreement between the plaintiff Lincoln Federal Labor Union #19129 and the defendant Northwestern Iron and Metal Company, including Paragraphs 2 and 3 thereof, are null and void and have been null and void and unenforceable since December 12, 1946, the effective date of said constitutional amendment;

7. That the refusal by the defendant Northwestern Iron and Metal Company to discharge the defendant Dan Giebelhouse, upon the demand of plaintiff Lincoln Federal Labor Union #19129 for his discharge based on his failure to maintain good standing in said Union, was lawful and proper, and compliance with said demand would have been unlawful and a violation of said constitutional amendment;

8. It is further ordered, adjudged, and decreed that the demurrer of the State of Nebraska is herewith sustained and the plaintiff's counsel having announced in open court that the plaintiffs would not amend their petition or plead further, the petition against the State of Nebraska is hereby dismissed.

9. It is further ordered that each party shall pay its own [fol. 51] costs.

Dated this 7th day of July, 1947.

By the Court, Ralph P. Wilson, District Judge.

[fol. 52]

[File endorsement omitted]

IN THE DISTRICT COURT FOR LANCASTER COUNTY

[Title omitted]

PLAINTIFFS' MOTION FOR NEW TRIAL—Filed July 7, 1947.

Come now each of the plaintiffs, separately and severally, and each for itself or himself moves the court to vacate the judgment entered herein and grant to each of said plaintiffs a new trial for each of the following causes:

1. The judgment is contrary to law.
2. The judgment is not sustained by the pleadings.
3. The judgment is contrary to the pleadings.
4. Errors of law occurring at the trial and excepted to by the plaintiffs.
5. The court erred in failing to overrule and in sustaining the motion of defendant Northwestern Iron and Metal Company and defendant Dan Giebelhouse for judgment on the pleadings.

6. The court erred in failing to overrule and in sustaining the motion of defendant Nebraska Small Business Men's Association for judgment on the pleadings.

7. The court erred in failing to overrule and in sustaining [fol. 53] the demurrer of the State of Nebraska.

8. The court erred in entering judgment against the plaintiffs, and each of them, in favor of the defendants.

9. The court erred in dismissing the plaintiffs' petition against the State of Nebraska.

10. The court erred in failing to enter judgment in favor of the plaintiffs, and each of them, against the defendants.

11. The court erred in finding and holding that the so-called Anti-Closed-Shop Amendment (hereinafter referred to as the Amendment) is a valid and proper exercise of the police powers of the State, and in failing to hold that said Amendment is not within such police powers.

12. The court erred in holding that a closed shop, union shop or maintenance of membership agreement is unlawful and void, and in failing to hold that each such agreement is lawful and valid.

13. The court erred in holding that the Amendment does not violate or conflict with any provision of the United States Constitution.

14. The court erred in holding that the said Amendment is in all respects valid and in failing to hold that it is unconstitutional and void under the United States Constitution.

15. The court erred in holding that the Amendment does not conflict with, impair, violate or contradict any provision of the National Labor Relations Act, or deprive the plaintiffs of any of the rights guaranteed by the said Act.

16. The court erred in holding that the said Amendment does not conflict with, impair, violate or contradict any provision of the Labor Management Relations Act of 1947, or deprive the plaintiffs of any rights guaranteed by the said Act.

17. The court erred in holding that the union shop provisions of the collective bargaining agreement herein,

including paragraphs two and three thereof, are null and void.

18. The court erred in holding that the refusal of defendant Northwestern Iron and Metal Company to discharge the defendant Giebelhouse was lawful and proper and that compliance with the demand to discharge him would have been unlawful.

19. The court erred in failing to hold that the said collective bargaining agreement was valid and enforceable in all respects.

20. The court erred in failing to order the defendant Northwestern Iron and Metal Company to specifically perform the said collective bargaining agreement in all of its provisions and to discharge the defendant Giebelhouse from its employ.

21. The court erred in failing to enjoin the defendant Northwestern Iron and Metal Company from continuing the defendant Giebelhouse in its employ.

22. The court erred in failing to grant each and every portion of the relief prayed for in the plaintiffs' petition.

23. The court erred in failing to hold that the Amendment arbitrarily and unreasonably impairs the obligations of existing contracts in violation of Article One, Section Ten of the United States Constitution.

24. The court erred in failing to hold that the Amendment arbitrarily and unreasonably deprives unions and employers, including each of the plaintiffs herein, of freedom of contract in violation of the due process clause of the Fourteenth Amendment of the United States Constitution.

25. The court erred in failing to hold that the Amendment is discriminatory and constitutes class legislation, denying unions and union members the equal protection of the laws contrary to the Fourteenth Amendment of the United States Constitution.

[fol. 55] 26. The court erred in failing to hold that the Amendment impairs and previously restrains the exercise of the civil rights of assembly and speech and other rights guaranteed to the plaintiffs under the First Amendment to the United States Constitution.

27. The court erred in failing to hold that the Amendment is in conflict with the commerce clause of the United States Constitution, Article One, Section Eight, and the actions of the Congress of the United States in occupying and preempting the field in question in the case at bar.

28. The court erred in failing to hold that the Amendment is in conflict with the National Labor Relations Act in violation of the said commerce clause and of Article Six, Section Two of the United States Constitution.

29. The court erred in failing to hold that the Amendment is in conflict with the Labor Management Relations Act of 1947 in violation of the said commerce clause and of Article Six, Section Two of the United States Constitution.

30. The court erred in failing to hold that the Amendment violates the United States Constitution in each and every respect set forth in the plaintiffs' petition.

31. The court erred in failing to tax all costs herein against the defendants.

32. The court erred in making each finding contained in the said judgment.

33. The court erred in entering each holding, declaration, order and adjudication contained in the said judgment.

Joseph A. Padway, Herbert S. Thatcher, Bernard S. Gradwohl, Attorneys for Plaintiffs.

[fol. 56] IN DISTRICT COURT OF LANCASTER COUNTY

[Title omitted]

ORDER OVERRULING MOTION FOR NEW TRIAL—July 7, 1947

This cause now comes on to be heard on motion of plaintiffs, separately and severally, to vacate judgment heretofore entered herein and to grant to each of said plaintiffs a new trial and is submitted to the Court, on due consideration whereof, the Court doth overrule said motions.

[fol. 57] IN THE DISTRICT COURT FOR LANCASTER COUNTY

PLAINTIFFS' NOTICE OF APPEAL—Filed July 9, 1947

To the above named defendants and each of them, including the intervening defendant:

You are hereby notified that the plaintiffs intend to prosecute an appeal, and do hereby appeal, to the Supreme Court of Nebraska from the judgment entered herein on July 7, 1947, and from the order overruling the motions for new trial entered herein on July 7, 1947, and from each and all other orders entered herein adverse to the plaintiffs.

Joseph A. Padway, Herbert S. Thatcher, Bernard S. Gradwohl, Attorneys for Plaintiffs, Appellants.

[fols. 58-59] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 60] And afterwards, to wit, on the 12th day of September, 1947, there was filed in the office of the Clerk of said Supreme Court of Nebraska certain Briefs of appellants containing Assignments of Error in the words and figures following, to wit:

[fol. 61] IN SUPREME COURT OF NEBRASKA

ASSIGNMENTS OF ERROR.

1. The judgment is contrary to law.
2. The court erred in holding that a closed shop, union shop or maintenance of membership relationship is unlawful or void.
3. The court erred in holding that the union shop provisions of the contract in the case at bar are void and unenforceable.
4. The court erred in holding that the so-called Nebraska Anti Closed Shop Amendment does not violate any of the provisions of the United States constitution.
5. The court erred in holding that the said amendment does not impair the obligations of existing contracts in vio-

lation of Article I, Section 10, of the United States Constitution.

6. The court erred in holding that the said Amendment does not constitute a deprivation of freedom of contract in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

7. The court erred in holding that the said Amendment is not discriminatory and class legislation in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

8. The court erred in holding that the said Amendment does not impair and previously restrain the exercise of the civil rights of assembly and speech guaranteed under the First Amendment to the United States Constitution, and as protected against State invasion by the Fourteenth Amendment.

9. The court erred in sustaining the defendants' demurrer and motions for judgment on the pleadings.

[fols. 62-63] 10. The court erred in entering judgment in favor of the defendants and in dismissing the plaintiffs' petition.

11. The court erred in not entering judgment in favor of the plaintiffs for each and all portions of the relief prayed for in plaintiffs' petition.

12. The court erred in overruling plaintiffs' motion for new trial.

[fols. 64-65] IN SUPREME COURT OF NEBRASKA

ORDER OF SUBMISSION—November 3, 1947

The following causes were argued by counsel and submitted to the Court:

No. 32342 Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., Appeal, Lancaster County

Robert G. Simmons, Chief Justice.

[fols. 66-67] IN SUPREME COURT OF NEBRASKA

Appeal from the District Court of Lancaster County

No. 32342

LINCOLN FEDERAL LABOR UNION — 19129, et al., Appellants,

v.

NORTHWESTERN IRON & METAL COMPANY, a Corporation,
et al., Appellees; Nebraska Small Business Men's Association,
Intervener, Appellee

JUDGMENT—March 19, 1948

This cause coming on to be heard upon appeal from the district court of Lancaster county, was argued by counsel and submitted to the court; upon due consideration whereof, the court finds no error apparent in the record of the proceedings and judgment of said district court. It is, therefore, considered, ordered and adjudged that said judgment of the district court be, and hereby is, affirmed; that appellees recover of and from appellants their costs herein expended, taxed at \$—; for all of which execution is hereby awarded, and that a mandate issue accordingly.

Robert G. Simmons, Chief Justice.

[fol. 68] IN SUPREME COURT OF NEBRASKA

32342

LINCOLN FEDERAL LABOR UNION No. 19129

v.

NORTHWESTERN IRON AND METAL COMPANY

Sections 13, 14, and 15, article XV, Constitution of Nebraska, are not in violation of any provision of the Constitution of the United States or in conflict with or repugnant to any federal law, but integrated therewith and, having a relationship to the public welfare, are a reasonable and valid exercise of police power by the state.

[fol. 69] Heard before Simmons, C. J., Paine, Messmore, Yeager, Chappell, and Wenke, J.J., and Landis, District Judge.

Orphans Filed March 19, 1948

CHAPPELL, J.:

By virtue of and in conformity with the self-executing provisions of section 2, article III, Constitution of Nebraska, the people of this state lawfully initiated, and on November 5, 1946, by a substantial majority adopted a constitutional amendment, which was proclaimed by the Governor as effective December 11, 1946. The amendment is now designated as sections 13, 14, and 15 of article XV, Constitution of Nebraska. See R. S. Supp. 1947. Hereinafter in this opinion it will be called the amendment.

This action was originally instituted by plaintiffs in the district court for Lancaster County to obtain a declaratory judgment with respect to the interpretation and constitutional validity of the amendment and to obtain equitable relief by specific performance and injunction. Defendant State of Nebraska filed a general demurrer to plaintiffs' petition, and all other defendants filed motions for judgment on the pleadings, thus making the issues entirely of law under such facts as were well pleaded in plaintiffs' petition.

The constitutional issues arose by virtue of plaintiffs' allegations that defendant Northwestern Iron and Metal Company, engaged in intrastate and interstate commerce, had breached its contract with plaintiff, Lincoln Federal Labor Union No. 19129, by the terms of which defendant company had agreed to discharge any employee who ceased to remain a member of the union in good standing. When defendant Dan Giebelhouse was suspended from plaintiff union for non payment of dues, the company, upon notice thereof and demand by the union for his discharge, refused to do so, taking the position that the union shop provisions of the contract were invalidated and made unenforceable by virtue of the adoption of the amendment. Plaintiff [fol. 70] Henry Reichel, an employee of defendant company and president of plaintiff Lincoln Federal Labor Union No. 19129, an affiliate of plaintiffs American Federation of Labor and Nebraska State Federation of Labor, took the position that the union shop provisions of the contract were

not invalidated by the adoption of the amendment, because it was unconstitutional for the reasons hereinafter set forth.

As held by this court in *Johnson v. Marsh*, 146 Neb. 257, 19 N. W. 2d 366: "A general demurrer admits all allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the conclusions of the pleader, except when supported by, and necessarily result from, the facts pleaded. It does not admit inferences of the pleader from the facts alleged, nor mere expressions of opinion, nor theories of the pleader, nor allegations of the pleader as to what will happen in the future, nor arguments, nor allegations contrary to the facts of which judicial notice is taken or which are contrary to law." See, also, 41 Am. Jur., Pleadings, §. 244, p. 463, and *Louisville & Nashville R. R. Co. v. Palmes*, 109 U. S. 244, 3 S. Ct. 193, 27 L. Ed. 922.

Since a motion for judgment on the pleadings is in the nature of a demurrer and is in substance both a motion and a demurrer, it has application in like manner as a demurrer under circumstances similar to those presented in the case at bar. See, *Vaughan v. Omaha Wimsett System Co.*, 143 Neb. 470, 9 N. W. 2d 792; *State ex rel. Western Reference & Bond Assn. v. Kinney*, 138 Neb. 574, 293 N. W. 393, reversed on other grounds as *Olsen v. Nebraska*, 131 U. S. 236, 61 S. Ct. 862, 85 L. Ed. 1305, 133 A. L. R. 1500.

In the light of the foregoing rules, the trial court sustained the demurrer and motion for judgment on the pleadings. Plaintiffs having elected to stand upon their petition, a judgment was entered in favor of defendants, declaring the amendment not in conflict with any federal law and constitutional as within the police power of the state, thereby making unlawful and unenforceable in Nebraska the provisions of the agreement between the parties whereby defendant agreed to discharge any employee who ceased to remain a member of the union in good standing, regardless of whether such agreement was executed before or after the effective date of the amendment.

Plaintiffs' motions for new trial were overruled, and they appealed to this court. In their brief they set forth at length some 12 assignments of alleged error. They may be summarized, however, as contending that the judgment of the trial court was contrary to law. Plaintiffs argued primarily that the amendment: (1) Impairs and previously

restrains the exercise of the civil rights of assembly and speech guaranteed under the First Amendment, and as protected against state invasion by the Fourteenth Amendment; (2) constitutes class legislation and is highly discriminatory, denying unions and union members the equal protection of the laws, contrary to the Fourteenth Amendment; and, (3) arbitrarily and unreasonably impairs the obligations of existing contracts in violation of article I, section 10, and arbitrarily and unreasonably deprives plaintiffs of rights, liberties, and freedoms protected under the due process clause of the Fourteenth Amendment. We conclude that those contentions cannot be sustained.

The amendment specifically provides: "Sec. 13. No person shall be denied employment because of membership in or affiliation with, or resignation or expulsion from a labor organization or because of refusal to join or affiliate with a labor organization; nor shall any individual or corporation or association of any kind enter into any contract, written or oral, to exclude persons from employment because of membership in or non-membership in a labor organization. Sec. 14. The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. Sec. 15. This article is self-executing and shall supersede all provisions in conflict therewith; legislation may be enacted to facilitate its operation but no law shall limit or restrict the provisions hereof."

At the outset it should be stated that we are not permitted to base our decision of the issues upon a judicial interpretation of the wisdom of its adoption. *Lennox v. Housing Authority of City of Omaha*, 137 Neb. 582, 290 N.W. 451. We are confronted primarily with a question of sovereign power. As stated in the opinion of Chief Justice Taney in the *License Cases*, 5 How. 504, 582: "Upon this question the object and motive of the State are of no importance, and cannot influence the decision. It is a question of power." See, also, *Carpenters & Joiners Union v. Ritter's Cafe*, 315 U.S. 722, 62 S. Ct. 807, 86 L. Ed. 1143.

In *Arizona Employers' Liability Cases*, 250 U.S. 400, 419, 39 S. Ct. 553, 63 L. Ed. 1058, 6 A. L. R. 1537, it was said:

"The States are left with a wide range of legislative discretion, notwithstanding the provisions of the Fourteenth Amendment; and their conclusions respecting the wisdom of their legislative acts are not reviewable by the courts."

In *Hennington v. Georgia*, 163 U.S. 299, 16 S. Ct. 1086, 41 L. Ed. 166, it was said: "The whole theory of our government, Federal and state, is hostile to the idea that questions of legislative authority may depend * * * upon opinions of judges as to the wisdom or want of wisdom in the enactment of laws under powers clearly conferred upon the legislature."

As recently as *Olsen v. Nebraska*, *supra*, the Supreme Court of the United States said: "We are not concerned, however, with the wisdom, need, or appropriateness of the legislation. Differences of opinion on that score suggest a choice which 'should be left where * * * it was left by the Constitution—to the States and to Congress.'"

In *S. Buchsbaum & Co. v. Beman*, 14 F. Supp. 444, it was said: "Every possible presumption is in favor of the validity of the statute, and this continues until the contrary is shown beyond a rational doubt. In no doubtful case should a legislative act be pronounced contrary to the Constitution. One branch of the government cannot encroach upon the domain of another without danger. The safety of our institutions depends upon a strict observance of this salutary rule." See, also, *Sinking Fund Cases*, 99 U.S. 700, 25 L. Ed. 496; *Nicol v. Ames*, 173 U.S. 509, 19 S. Ct. 522, 43 L. Ed. 786; *Fairbank v. United States*, 181 U.S. 283, 21 S. Ct. 648, 45 L. Ed. 862; *Lennox v. Housing Authority of City of Omaha*, *supra*; 16 C. J. S., Constitutional Law, s. 99, p. 250.

In *National Labor Relations Board v. Jones & Laughlin*, 301 U.S. 1, 30, 57 S. Ct. 615, 81 L. Ed. 893, 108 A. L. R. 1352, it was said: "The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same." See, also, *S. Buchsbaum & Co. v. Beman*, *supra*; *Panama R. Co. v. Johnson*, 264 U.S. 375, 44 S. Ct. 391, 68 L. Ed. 748; *Blodgett v. Holden*, 275 U.S. 142, 48 S. Ct. 105, 72 L. Ed. 206; *Lucas v. Alexander*, 279 U.S. 573, 49 S. Ct. 426, 73 L. Ed. 851, 61 A. L. R. 906.

[fol. 74] As a matter of course, the above rules have application in determining the validity of a constitutional amendment adopted by virtue of the initiative, the first power constitutionally reserved by the people of this state.

All of which brings us to an interpretation of the amendment. It will be observed that section 14 thereof defines the term "labor organization" in the equivalent language used not only in the National Labor Relations Act, Title 29, U.S.C.A., s. 152 (5), but also in the Labor Management Relations Act, 1947, c. 475, Public Law 101, s. 2 (5). Therefore, nothing provided therein could effect the constitutionality of the amendment. No contention is made otherwise.

The constitutional questions are involved primarily because of sections 13 and 15. As we construe section 13, the first part thereof, down to the "...", simply provides that the hiring and firing of no individual shall be dependent upon his membership or non membership in a labor organization. He is thereby made free to "associate with his fellows" in a union entirely upon its merits, or to "decline to associate with his fellows" without imperiling his right either to obtain employment or to continue therein after having obtained it. In other words, the lawful right of the individual to enter employment and his lawful right to continue in his employment cannot be lawfully made to depend either upon the one condition or the other, and he is given a cause of action for violation of that right.

The second part of section 13, after "...", is simply a correlation of the first and imposes the quality of illegality upon the provisions of any contract which would violate the first by excluding any person from employment because of membership or non membership in a labor organization, and makes such provisions of any contract invalid and unenforceable as between the parties, without in any logical [fol. 75] sense impairing or abridging the right of employees to self organization and collective bargaining, established by Title 29, U.S.C.A., s. 157, hereinafter discussed.

It will be noted that section 15 makes the amendment self executing, and it thereby became operative upon all such contracts as of its effective date. Therefore, if constitutionally valid as an exercise of the police power of the state, the amendment has application to prevent the enforcement of such provisions in all contracts, whether executed prior to or after the effective date of the amendment.

As we view the matter, however, and as the parties involved herein, as well as the trial court, must also have viewed it, the amendment was not intended to and could not so operate as to invalidate and make unenforceable all the other valid provisions of the collective bargaining agreement then existing between the parties. In other words, valid collective bargaining agreements, either existent on the effective date of the amendment or entered into thereafter, would be enforceable in all respects except the provisions in such agreements which would be in conflict with the amendment.

It was argued in the district court that the amendment was invalid because in conflict with the National Labor Relations Act. However, since that argument was made, Congress has passed the Labor Management Relations Act of 1947, which, after specifically amending the National Labor Relations Act, provided, among other things: "Sec. 14. (b) Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

While such provision would seem to conclusively dispose [fol. 76] of plaintiffs' argument, the constitutionality thereof has not yet been determined, and, since plaintiffs still contend that the amendment conflicts with paramount federal law, we feel impelled to discuss and decide plaintiffs' contention.

The constitutionality of the National Labor Relations Act has been conclusively affirmed, and in a manner clearly indicating that the validity of the above provision of the Labor Management Relations Act will also be constitutionally affirmed. See *National Labor Relations Board v. Jones & Laughlin*, *supra*. In any event we conclude that the amendment was not in conflict with the National Labor Relations Act, and, having been adopted prior to enactment of the Labor Management Relations Act, the amendment is integrated therewith.

It was said in *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 67 S. Ct. 1026, 91 L. Ed. 887: "In the National Labor Relations Act, Congress has sought to reach some aspects of the employer-employee relation out of which such interferences arise. It has dealt with the subject or relationship but partially, and has left

outside of the scope of its delegation other closely related matters. Where it leaves the employer-employee relation free of regulation in some aspects, it implies that in such matters federal policy is indifferent, and since it is indifferent to what the individual of his own volition may do we can only assume it to be equally indifferent to what he may do under the compulsion of the state."

Allen Bradley Local v. Wisconsin Employment Relations Board, 315 U.S. 740, 62 S. Ct. 820, 86 L. Ed. 1154, is authority for the proposition that the intent of Congress to exclude the states from exercising their police power in the field of commerce must be clearly manifest. In discussing the National Labor Relation Act and its relationship to that premise, the court said: " * * * an intention of Congress [fol. 77] to exclude States from exerting their police power must be clearly manifested. * * * We will not lightly infer that Congress by the mere passage of a federal Act has impaired the traditional sovereignty of the several States in that regard. * * * Nor can we say that the control which Congress has asserted over the subject matter of labor disputes is so pervasive (*Cf. Cloverleaf Butter Co. v. Patterson, ante*, p. 148) as to prevent Wisconsin, under the familiar rule of *Pennsylvania R. Co. v. Public Service Comm'n*, 250 U.S. 566, 569, from supplementing federal regulation in the manner of this order. Sec. 7 of the federal Act guarantees labor its 'fundamental right' (*Labor Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33) to self-organization and collective bargaining. Sec. 8 affords employees protection against unfair labor practices of employers including employer interference with the rights secured by sec. 7. * * * If the order of the state Board affected the status of the employees, or if it caused a forfeiture of collective bargaining rights, a distinctly different question would arise. But since no such right is affected, we conclude that this case is not basically different from the common situation where a State takes steps to prevent breaches of the peace in connection with labor disputes. Since the state system of regulation, as construed and applied here, can be reconciled with the federal Act and since the two as focused in this case can consistently stand together, the order of the State Board must be sustained under the rule which has long obtained in this Court. See *Sinnot v. Davenport*, 22 How. 227, 243."

In *Phelps Dodge Corporation v. National Labor Relations Board*, 313 U.S. 177, 61 S. Ct. 845, 85 L. Ed. 1271, 133 A.L.R. 1217, it was said: "And so the present Act, codifying this long history, leaves the adjustment of industrial relations to the free play of economic forces but seeks to assure that the play of those forces be truly free. * * * The prohibition [fol. 78] against 'discrimination in regard to hire' must be applied as a means towards the accomplishment of the main object of the legislation. * * *

"The natural construction which the text, the legislative setting and the function of the statute command, does not impose an obligation on the employer to favor union members in hiring employees. He is as free to hire as he is to discharge employees. The statute does not touch 'the normal exercise of the right of the employer to select its employees or to discharge them.' It is directly solely against the abuse of that right by interfering with the countervailing right of self-organization.

"We have already recognized the power of Congress to deny an employer the freedom to discriminate in discharging. *Labor Board v. Jones & Laughlin*, 301 U.S. 1."

As stated in *Associated Press v. National Labor Relations Board*, 301 U.S. 103, 132, 57 S. Ct. 650, 81 L. Ed. 953: "The act does not compel the petitioner to employ any one; * * *

In *National Labor Relations Board v. Jones & Laughlin*, *supra*, it was said: "The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion."

As stated in *National Labor Relations Board v. National Casket Co.*, 107 Fed. 2d 992: "The purpose of the Act is not to compel an employer to hire members of one union rather than another, or union men rather than non-union men."

In *International B. of P.M. v. Wisconsin E.R. Board*, 249 [fol. 79] Wis. 362, 24 N.W. 2d 672, the principal contention of the union was that section 8 (3) of the National Labor Relations Act conferred upon unions and employers the

right to enter into an agreement for a closed shop, and that the Wisconsin Employment Peace Act, limiting that right, was in conflict with it.

In that opinion it was said: "Counsel have repeatedly argued to this Court that sec. 8 (3), National Labor Relations Act, already quoted, confers a right. Departing from the precise language of sub. (3), the proviso is as follows: Nothing in this act shall preclude an employer from making an agreement with a labor organization which requires as a condition of employment membership in a union. Just how this clause grants a right, it is difficult to see."

At another point in the opinion it was said: "It is well settled that reports of committees of the house of representatives and of the senate may be consulted to ascertain the intent of Congress as to the meaning of a statute enacted by it. *Wright v. Vinton Branch, etc.* (1937) 300 U.S. 440, 57 Sup. Ct. 556, 81 L. Ed. 736, 112 A. L. R. 1455, and cases cited in Note 8, p. 1463.

"Referring now to Senate Reports 74th Congress, 1st session (1935) Report No. 573, we find the following (p. 11):

"Problem of the Closed Shop.

" Propaganda has been widespread that this proviso attaches special legal sanctions to the closed shop or seeks to impose it upon all industry. This propaganda is absolutely false. . . . The committee feels that this was not the intent of Congress . . . ; that it is not the intent of Congress today; and that it is not desirable to interfere in this drastic way with the laws of the several states on this subject.

"But to prevent similar misconceptions of this bill, the [fol. 80] proviso in question states that nothing in this bill, or in any other law of the United States, or in any code or agreement approved or prescribed thereunder, shall be held to prevent the making of closed-shop agreements between employers and employees. In other words, the bill does nothing to facilitate closed-shop agreements or to make them legal in any state where they may be illegal; it does not interfere with the status quo on this debatable subject but leaves the way open to such agreements as might now legally be consummated, with two exceptions about to be noted.

"The assertion that the bill favors the closed shop is particularly misleading in view of the fact that the proviso in two respects actually narrows the now existent law regarding closed-shop agreements. . . .

"Secondly, the bill is extremely careful to forestall the making of closed-shop agreements with organizations that have been "established, maintained, or assisted" by any action defined in the bill as an unfair labor practice. . . .

The opinion then went on to say: "This report sustains the construction of the proviso that we have adopted (International B. of E. W. v. Wisconsin E. R. Board, 245 Wis. 532, 15 N. W. (2d) 823), that is, that it granted no right but if there were any impediments to such an agreement in the laws of the United States, they were removed by the provisions of sec. 8 (3). . . .

"From the report of the committee it appears that Congress intended to leave state laws regarding the closed shop in force."

Section 14 (b) of the Labor Management Relations Act, which cannot be construed as an invalid delegation of legislative authority, re-established that intent beyond peradventure of a doubt.

The federal public policy in regard to compulsory membership in labor unions was stated in Title 29, U. S. C. A., s. 102, wherein it was said: ". . . he should be free to decline to associate with his fellows. . . ."

Title 29, U. S. C. A., s. 157, provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection." The amendment involved here cannot be construed as impairing, denying, or abridging the right of employees to join and organize into a union and bargain collectively with an employer in conformity with federal law, as provided in that section. It is a matter of common knowledge that many collective bargaining agreements have been and are now being entered into in this state since the adoption of the amendment, which brooks no interference therewith by the employer, and makes the employee directly free from coercion or discrimination by either the employer or the union or members thereof. It does not prohibit such contracts or the enforcement thereof. It does,

however, simply make invalid and unenforceable as between the parties, any provision therein agreeing to exclude persons from employment because of membership or non-membership in a labor organization.

We are unable to find any labor legislation enacted by Congress requiring an employee to belong or not belong to a labor organization in order to receive the benefits thereof, or for any other purpose. As a matter of fact, the Railway Labor Act, Title 45, U. S. C. A., c. 8, the constitutionality of which was conclusively affirmed in *Virginia Ry. Co. v. System Federation*, 300 U. S. 515, 57 S. Ct. 592, 81 L. Ed. 789, and discussed by laudatory language in *Labor Board v. Jones & Laughlin*, *supra*, specifically provides in s. 152 (5): "No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement [fol. 82] promising to join or not to join a labor organization, and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way." The amendment at bar certainly does no more than exemplify and apply that policy to all employers and employees in this state.

Plaintiffs argued that the amendment impairs and restrains the exercise of civil rights of assembly and free speech guaranteed by the First Amendment and protected by the Fourteenth Amendment to the Constitution of the United States. The wording of the act is not ambiguous. We cannot by any construction conclude that it violates the First Amendment by abridging freedom of speech, or the press, or the right of assembly, or the right of petition to the government for redress. As a matter of fact, it preserves to all employees the right to organize and join a union and the right to bargain collectively without fear of reprisal. Instead of preventing or abridging rights of speech, press, assembly, or petition, guaranteed by the First Amendment, the amendment preserves it for all employees, not only to those who join but also to those who do not join a union. Therefore, the amendment does not abridge the privileges or immunities of any citizen of the United States in violation of the Fourteenth Amendment, but affirmatively protects those rights. See *American Federation of Labor v. Watson*, 60 F. Supp. 1010; *State v. Whitaker*, — N.C. —.

45 S. E. 2d 860; *American Federation of Labor v. American Sash & Door Co.*, — Ariz., —, — P. 2d —.

Plaintiffs argued that the amendment constituted class legislation and denied unions and union members equal protection of the laws, contrary to the Fourteenth Amendment. We cannot sustain that contention. The amendment prohibits no one from joining a union, but undertakes to [fol. 83] lawfully assert that neither membership nor non-membership in a union shall be a condition precedent to the right to work. It is inclusive of all employers and employees in this state. It does not deny the union member the equal protection of the law, but gives the non-union employee a protection of the law which he had not theretofore enjoyed. See *American Federation of Labor v. Watson*, *supra*.

The amendment complies strictly with the guiding principle most often stated by courts to the effect that: " * * * this constitutional guaranty requires that all persons shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." 12 Am. Jur., Constitutional Law, s. 469, p. 129.

As stated in *Barbier v. Connolly*, 113 U. S. 27, 5 S. Ct. 357, 28 L. Ed. 923, and approved in *Truax v. Corrigan*, 257 U. S. 312, 333, 42 S. Ct. 124, 66 L. Ed. 254, 27 A. L. R. 375: "Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

In *Hayes v. Missouri*, 120 U. S. 68, 7 S. Ct. 350, 30 L. Ed. 578, the court, in speaking of the equal protection clause of the Fourteenth Amendment, said: "It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed."

It was said in *Truax v. Corrigan*, *supra*: " * * * the guaranty was intended to secure equality of protection not only for all but against all similarly situated. Indeed, protection is not protection unless it does so."

[fol. 84] In *Yick Wo v. Hopkins*, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220, speaking of due process and the equality clause of the Fourteenth Amendment, the court said: "These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any dif-

ferences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."

We come then to plaintiffs' contention that the amendment deprives them of rights and privileges under the due process clause of the Fourteenth Amendment. We conclude that it does not. In that connection, we are required to discuss and decide whether or not the amendment is within the police power of the state and whether or not it is reasonable and has a relationship to the public welfare. As related to legislation, it is generally held that due process is satisfied if there was legislative power to act on the subject matter, if that power was exercised in a reasonable and indiscriminatory manner, and if the act, being definite, has a reasonable relationship to a proper legislative purpose. 16 C. J. S., Constitutional Law, s. 569, p. 1156; *Rein v. Johnson*, 149 Neb. 67, 30 N. W. 2d 548.

It will be noted at the outset that by virtue of the Tenth Amendment, Constitution of the United States: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." That provision cannot be amended or obliterated by judicial decree, but only by the source from which it derived original validity.

Therefore, in construing a federal law, courts look to see if the power has been delegated, but in construing a state law they look to see if it has been prohibited, realizing that the people of a state, by reason of the sovereign power vested in them, may enact a law or alter and amend their [fol. 85] own constitution by the method prescribed in the instrument itself, subject, however, to every limitation or restraint lawfully imposed upon them by virtue of some authority derived from the Constitution of the United States. See 11 Am. Jur., Constitutional Law, s. 245, p. 966; et seq.

"Police power is the exercise of the sovereign right of a government to promote order, safety, health, morals, and the general welfare of society, within constitutional limits.

• • • As applied to the powers of the states of the American Union, the term is also used to denote those inherent governmental powers which, under the federal system established by the constitution of the United States, are reserved to the several states." 16 C. J. S., Constitutional Law, s.

174, p. 537. See, also, 11 Am. Jur., Constitutional Law, s. 255, p. 986.

In *Reid v. Colorado*, 187 U. S. 137, 148, 23 S. Ct. 92, 47 L. Ed. 108, it was said: "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that 'in the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.' *Sinnot v. Davenport*, 22 How. 227, 243."

As recently as *Placek v. Edstrom*, 148 Neb. 79, 26 N. W. 2d 489, which involved the state par-check law, this court, in conformity with federal precedent, held that: "No provision of the Constitution of the United States was ever intended to take from states the right to properly exercise their police powers which generally extend to all the great [fol. 86] public needs which are lawfully recognized as immediately necessary to promote the public welfare."

It was said recently in *Abeln v. City of Shakopee*,—Minn. —, 28 N. W. 2d 642: "Clearly, the original Constitution did not deprive the states of their police power, which they might exercise for the protection of the public health, welfare, and morals. * * * No restraints were imposed upon the police power by the adoption of the Fourteenth Amendment."

As early as *Wenhan v. State*, 65 Neb. 394; 91 N. W. 421, in which the constitutionality of a statute regulating and limiting the hours of employment for female employees was sustained, this court said: "The police power of the state can not be put forward as an excuse for oppressive and unjust legislation, but it may be lawfully resorted to for the purpose of preserving the public health, safety or morals; and a large discretion is vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests."

Fansteel Metallurgical Corporation v. Lodge 66, 295 Ill. App. 523, 14 N. E. 2d 991, is authority for the proposition that Congress, by its enactment of the National Labor Re-

lations Act, did not deprive or attempt to deprive the states of their police power.

In *Thomas v. Collins*, 323 U. S. 516, 532, 65 S. Ct. 315, 89 L. Ed. 430, it was said: "That the State has power to regulate labor unions with a view to protecting the public interest is, as the Texas court said, hardly to be doubted. They cannot claim special immunity from regulation." See, also, *Railway Mail Assn. v. Corsi*, 326 U. S. 88, 65 S. Ct. 1483, 89 L. Ed. 2072, sustaining the New York anti-discrimination statute.

In *Carpenters & Joiners Union v. Ritter's Cafe*, *supra*, it [fol. 87] was said: "It is not for us to assess the wisdom of the policy underlying the law of Texas. Our duty is at an end when we find that the Fourteenth Amendment does not deny her the power to enact that policy into law."

In that opinion the court also said: "The right of the state to determine whether the common interest is best served by imposing some restrictions upon the use of weapons for inflicting economic injury in the struggle of conflicting industrial forces has not previously been doubted. See Mr. Justice Holmes in *Aikens v. Wisconsin*, 195 U. S. 194, 205, and Mr. Justice Brandeis in *Truax v. Corrigan*, *supra*, at 372, *Dorchy v. Kansas*, 272 U. S. 306, 311, and *Senn v. Tile Layers Protective Union*, 301 U. S. 468, 481. * * * We must be mindful that 'the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants.' *Thornhill v. Alabama*, 310 U. S. 88, 103-04."

In *Barbier v. Connolly*, *supra*, it was said: "But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity."

In *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 65 S. Ct. 1515, 89 L. Ed. 1915, it was said: "Although the commerce clause conferred on the national government power to

[fol. 88] regulate commerce, its possession of the power does not exclude all state power of regulation. Ever since *Willson v. Black-Bird Creek Marsh Co.*, 2 Pet. 245, and *Cooley v. Board of Wardens*, 12 How. 299, it has been recognized that, in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it."

In *Parker v. Brown*, 317 U. S. 341, 359, 63 S. Ct. 307, 87 L. Ed. 315, it was said: "The governments of the states are sovereign within their territory save only as they are subject to the prohibitions of the Constitution or as their action in some measure conflicts with powers delegated to the National Government, or with Congressional legislation enacted in the exercise of those powers. This Court has repeatedly held that the grant of power to Congress by the Commerce Clause did not wholly withdraw from the states the authority to regulate the commerce with respect to matters of local concern, on which Congress has not spoken."

At another point in the opinion, the court said: "Because of its local character also there may be wide scope for local regulation without substantially impairing the national interest in the regulation of commerce by a single authority and without materially obstructing the free flow of commerce, which were the principal objects sought to be secured by the Commerce Clause. . . . There may also be, as in the present case, local regulations whose effect upon the national commerce is such as not to conflict but to coincide with a policy which Congress has established with respect to it."

In speaking of police power reserved to the states, it was said in the opinion of Chief Justice Taney in the *License Cases*, *supra*: "It is by virtue of this power that it legislates; and its authority to make regulations of commerce is [fol. 89] as absolute as its power to pass health laws, except in so far as it has been restricted by the constitution of the United States."

The above-quoted statement was approved in *Nebbia v. New York*, 291 U. S. 502, 525, 54 S. Ct. 505, 78 L. Ed. 940, 89 A. L. R. 1469, wherein it was also said: "The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regu-

lation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.

• • • The reports of our decisions abound with cases in which the citizen, individual or corporate, has vainly invoked the Fourteenth Amendment in resistance to necessary and appropriate exertion of the police power." See, also, 16 C. J. S., Constitutional Law, s. 569 (3), p. 1156.

The legislative and judicial history of the exercise of police power, together with a synopsis of its elasticity, adaptability, and appropriate application to the relationship between employers and employees, will be found in the dissenting opinion of Justice Brandeis in *Truax v. Corrigan*, *supra*. Like history will also be found in *State v. Whitaker*, *supra*, which held constitutional a statute of North Carolina, sections 2, 3, and 4 of which were similar to the Nebraska amendment in all material respects.

It was said in *American Federation of Labor v. Watson*, *supra*: "Labor and labor unions are affected with a public interest and are subject to the regulatory power of the states for any reasonable regulation which will not be inconsistent with the Constitution of the United States and statutes enacted within the scope delegated by the Constitution to the Congress."

Without doubt the amendment was within the police power of this state. Therefore, we turn to the question of whether or not it is reasonable and has a relationship to the public welfare. In that connection we conclude that it is reasonable and that it does have such relationship.

In *Gundling v. Chicago*, 177 U. S. 183, 20 S. Ct. 633, 44 L. Ed. 725, it was said: "• • • unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizens are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference."

It was said in the opinion of Justice McLean in the License Cases, *supra*: "In all matters of government, and

especially of police, a wide discretion is necessary. It is not susceptible of an exact limitation, but must be exercised under the changing exigencies of society. In the progress of population, of wealth, and of civilization, new and vicious indulgencies spring up, which require restraints that can only be imposed by the legislative power."

In *Muller v. Oregon*, 208 U. S. 412, 28 S. Ct. 324, 52 L. Ed. 551, a statute regulating and limiting the hours of labor for female employees was sustained. In the opinion it was said: "Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge."

In *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 399, 57 S. Ct. 578, 81 L. Ed. 703, 108 A. L. R. 1330, it was said: "The legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection. The adoption of similar requirements by many States evidences a deepseated conviction both as to the presence of the evil and as to the means adapted to check it. Legislative response to that conviction cannot be regarded as arbitrary or capricious, and that is all we have to decide. Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment."

We call attention to an appropriate statement appearing in *Home Building & Loan Assn. v. Blaisdell*, 290 U. S. 398, 442, 54 S. Ct. 231, 78 L. Ed. 413, 88 A. L. R. 1481: "It is manifest from this review of our decisions that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the com-

plexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very basis of individual opportunity. Where, in [fol. 92] earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends.

“It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—‘We must never forget that it is a *Constitution* we are expounding’ (McCulloch v. Maryland, 4 Wheat. 316, 407)—‘a constitution intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs.’ Id. p. 415. When we are dealing with the words of the Constitution, said this Court in Missouri v. Holland, 252 U. S. 416, 433, ‘we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. . . . The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.’

“Nor is it helpful to attempt to draw a fine distinction between the intended meaning of the words of the Constitution and their intended application. When we consider the contract clause and the decisions which have expounded it in harmony with the essential reserved power of the States to protect the security of their peoples, we find no warrant for the conclusion that the clause has been warped by these decisions from its proper significance or that the founders of our Government would have inter-

interpreted the clause differently had they had occasion to assume that responsibility in the conditions of the later day. The vast body of law which has been developed was unknown to the fathers, but it is believed to have preserved the essential content and the spirit of the Constitution. With a growing recognition of public needs and the relation of individual right to public security, the court has sought to prevent the perversion of the clause through its use as an instrument to throttle the capacity of the States to protect their fundamental interests. This development is a growth from the seeds which the fathers planted. It is a development forecast by the prophetic words of Justice Johnson in *Ogden v. Saunders*, already quoted. And the germs of the later decisions are found in the early cases of the Charles River Bridge and the West River Bridge, *supra*, which upheld the public right against strong insistence upon the contract clause. The principle of this development is, as we have seen, that the reservation of the reasonable exercise of the protective power of the State is read into all contracts * * *

In *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 488, 41 S. Ct. 172, 65 L. Ed. 349, 16 A. L. R. 196, Mr. Justice Brandeis in a dissent, said: "All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it [fol. 94] cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest, and to declare the duties which the new situation demands."

The people of this state initiated the amendment by original action, without legislative intervention, by filing petitions with the Secretary of State, which were signed by ten percent or more of the electors of the state, so distributed as to include five percent or more of the electors of each of two-fifths or more of the counties of the state. At the election the amendment was adopted by a vote of 212,443 For and 142,702 Against. It is common knowledge that its provisions and purposes, as well as the reasons for its adoption or rejection, were widely publicized and ably presented to the electorate of this state prior to the election. It was adopted after considerate and deliberate

action. Thus it was decided that its provisions were reasonable and necessary to safeguard the integrity of government and preserve the economic structure and security of the people for the protection of their welfare. With that decision, courts have no right to interfere.

As conditions arising out of powerful industries required legislative regulation thereof to protect first the public generally, and then labor itself, which legislation courts generally have sustained, so now the people of this and other states have evidently decided that conditions have arisen in powerful industries and powerful labor forces as well, requiring legislative regulation of them both in order to protect the public. The Labor Management Relations Act of 1947 was ostensibly enacted for that purpose. As a basis for its enactment, Congress recognized, as disclosed by its committee reports, that such conditions were nation-wide in scope, and specifically provided for the integration of state laws therewith, characterized by the amendment al-[fol. 95] ready adopted in this state.

We take judicial notice of the fact that at this writing no less than 18 states have enacted similar legislation, 6 by constitutional enactment and 12 by statutory provisions.

Florida's constitutional amendment was sustained by an able opinion in *American Federation of Labor v. Watson*, *supra*. True, upon appeal therefrom, the Supreme Court of the United States (327 U. S. 582) refused to finally pass upon the constitutionality of the Florida amendment until it had been authoritatively construed by the state court, but nevertheless the opinion established a yardstick for its constitutional measurement which affirmatively parallels and sustains our construction of the amendment in the case at bar.

The Supreme Court of Arizona in *American Federation of Labor v. American Sash & Door Co.*, *supra*, sustained the constitutionality of that state's constitutional amendment, which is very similar to the one here involved.

Likewise, the Supreme Court of Tennessee, in *Mascari v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America*, — Tenn. —, — S. W. 2d —, sustained the constitutionality of that state's legislative act, sections 1 and 2 of which are almost identical with this state's constitutional amendment.

In the light of the foregoing, we conclude that the amendment is a reasonable and valid exercise of the police power of the state, and as such has a real and substantial relation to its object, the public welfare.

Bearing in mind the foregoing related propositions of law, we turn to the question whether the amendment impairs the obligations of existing contracts in violation of [fol. 96] article I, section 10, Constitution of the United States. We conclude that it does not.

Wenham v. State, supra, involved the constitutionality of an act regulating and limiting the hours of employment for female employees. In that opinion this court specifically held that such an act was not class legislation, and that the act was only a fair and reasonable exercise of the police power, in that it did not prohibit the right of contract but merely regulated the same in a reasonable manner as in the case at bar. In that connection, the court said: "The right of contract itself is subject to certain limitations which the state may lawfully impose in the exercise of its police power, and this power has been greatly expanded in its application during the past century, * * *"

In *Patterson v. Bark Eudora*, 190 U. S. 169, 23 S. Ct. 821, 47 L. Ed. 1002, it was said: "That there is, generally speaking, a liberty of contract which is protected by the Fourteenth Amendment may be conceded, yet such liberty does not extend to all contracts. As said in *Frisbie v. United States*, 157 U. S. 160, 165: 'While it may be conceded that, generally speaking, among the inalienable rights of the citizen is that of the liberty of contract, yet such liberty is not absolute and universal. It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. It may * * * restrain all engaged in any employment from any contract in the course of that employment which is against public policy.'

As stated in *Muller v. Oregon, supra*: "It is undoubtedly true, as more than once declared by this court, that the general right to contract in relation to one's business is part of the liberty of the individual, protected by the Fourteenth Amendment to the Federal Constitution; yet it is [fol. 97] equally well settled that this liberty is not absolute and extending to all contracts, and that a State may, without conflicting with the provisions of the Fourteenth

Amendment, restrict in many respects the individual's power of contract."

In *Nebbia v. New York*, *supra*, it was said: "Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest."

In speaking of deprivation of freedom of contract, it was said in *West Coast Hotel Co. v. Parrish*, *supra*: "What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."

"This essential limitation of liberty in general governs freedom of contract in particular. More than twenty-five [fol. 98] years ago we set forth the applicable principle in these words, after referring to the cases where the liberty guaranteed by the Fourteenth Amendment had been broadly described:

"But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations

and prohibitions imposed in the interests of the community. *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 567.

"This power under the Constitution to restrict freedom of contract has had many illustrations. That it may be exercised in the public interest with respect to contracts between employer and employee is undeniable." Many such illustrations are cited and discussed by the court in its opinion at page 393.

In *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 17 S. Ct. 718, 41 L. Ed. 1165, it was said: "But into all contracts, whether made between States and individuals, or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the preexisting and higher authority of the laws of nature, of nations or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all and need never, therefore, be carried into express stipulation, for this could add nothing to their force."

In that regard, *Home Bldg. & Loan Assn. v. Blaisdell*, *supra*, said: "* * * the State also continues to possess [fol. 99] authority to safeguard the vital interests of its people. It does not matter that such legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect.' * * * Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worthwhile,—a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court."

In *Indiana ex rel. Anderson v. Brand*, 303 U. S. 95, 108, 58 S. Ct. 443, 82 L. Ed. 685, 113 A. L. R. 1482, it was said: "Our decisions recognize that every contract is made subject to the implied condition that its fulfillment may be frustrated by a proper exercise of the police power * * *"

In *Union Dry Goods Co. v. Georgia Public Service Corpo-*

ration, 248 U. S. 372, 39 S. Ct. 117, 63 L. Ed. 309, 9 A. L. R. 1420, it was said: "That private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict, has been often decided by this court."

In *Manigault v. Springs*, 199 U. S. 473, 26 S. Ct. 127, 50 L. Ed. 274, it was said: "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers . . . for the general good of the public, though contracts previously entered into by individuals may thereby be affected."

In *Atlantic Coast Line R. R. Co. v. City of Goldsboro*, [fol. 100] 232 U. S. 548, 558, 34 S. Ct. 364, 58 L. Ed. 721, it was said: ". . . it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of over-riding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise."

In the recent case of *East New York Savings Bank v. Hahn*, 326 U. S. 230, 66 S. Ct. 69, 90 L. Ed. 34, 160 A. L. R. 1279, it was said: "The formal mode of reasoning by means of which this 'protective power of the State,' . . . is acknowledged is of little moment. It may be treated as an implied condition of every contract and, as such, as much part of the contract as though it were written into it, whereby the State's exercise of its power enforces, and does not impair, a contract. A more candid statement is to recognize as was said in *Manigault v. Springs*, *supra*, that the power, 'which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the . . . general welfare of the people, and is paramount to any rights under contracts between individuals.' . . . Once we are in this domain of the reserve power of a State we must respect the 'wide discretion on the part of the legislature in determining what is and what is not necessary.' . . . So far as the constitutional issue is concerned, 'the power of the

State when otherwise justified,' . . . is not diminished because a private contract may be affected."

In *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 28 S. Ct. 529, 52 L. Ed. 828, it was said: "One whose rights, such as they are, are subject to state restriction, cannot re-[fol. 101-102] move them from the power of the State by making a contract about them."

It is evident that parties cannot lawfully deprive the state of its police power simply by making a contract between themselves. Since this power of the state to pass legislation which may affect existing contracts is implied in every contract drawn, then we must read the contract between plaintiff, Lincoln Federal Labor Union, and defendant, Northwestern Iron and Metal Company, as if it actually provided that it was subject to any legislation which the state might adopt under its police power. With such sovereign power implied in the contract, the amendment in question did not impair the existing provisions in their contract but was actually a part of it, and therefore not in violation of any provision of the Federal Constitution.

For the reasons heretofore stated, we conclude that the amendment is a reasonable, proper, and valid exercise of the police power of the state. As such, it is not in conflict with or repugnant to any federal law, but integrated therewith, and does not violate any provision of the Constitution of the United States, but on the contrary guarantees all those rights to all persons whomsoever within this state, whether employers or employees, union members or non-union members.

Therefore, the judgment of the trial court should be and hereby is affirmed.

Affirmed.

[fol. 103] IN THE SUPREME COURT OF NEBRASKA

[Title omitted]

PETITION FOR ALLOWANCE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES—Filed April 1, 1948

To the Honorable Robert G. Simmons, Chief Justice of the
Supreme Court of Nebraska:

Your petitioners, Lincoln Federal Labor Union #19129, American Federation of Labor, Nebraska State Federation of Labor, and Henry Reichel, individually and as President of said Lincoln Federal Labor Union #19129, respectfully show:

1. The petitioner, Lincoln Federal Labor Union #19129, is a local union functioning in the City of Lincoln, Nebraska, and affiliated with both the petitioner Nebraska State Federation of Labor and petitioner American Federation of Labor. The petitioner, Henry Reichel, is President of said local union and an employee of the respondent, Northwestern Iron and Metal Company. On February 19, 1947, [fol. 104] petitioners filed a complaint in the District Court of Lancaster County seeking a declaratory judgment and equitable relief in respect to the application as against them of an amendment to the Constitution of the State of Nebraska, adopted in November of 1946 and commonly referred to as the "Anti-Closed-Shop Amendment," and also in respect to the rights of such petitioners, under a union-shop agreement entered into prior to the effective date of such amendment. Such amendment purported to outlaw all existing and future closed-shop or union-security agreements or other type of agreement requiring membership in a labor organization as a condition of employment. The complaint named as defendants an employer, the Northwestern Iron and Metal Company, with which the petitioner Lincoln Federal Labor Union #19129 had a union-shop agreement, an individual, Dan Giebelhouse, who was an employee of the Company and whom the Company refused to discharge because of his failure to maintain his membership in the union, and the State of Nebraska. The Nebraska Small Business Men's Association, an unincorporated organization of business firms, was granted leave to participate as an intervenor. The complaint alleged that the amendment, in so far as it purported to outlaw the union-shop agreement between the union and the Company, entered into prior to the effective date of the amendment, and to prevent the union from obtaining the discharge of Giebelhouse thereunder as required by the contract, was illegal and void as contrary to the federal Constitution.

2. The defendants moved to dismiss the complaint on the ground that, since the amendment was constitutional, the

complaint stated no cause of action. The trial court granted such motion to dismiss for such reason.

3. The petitioners thereupon appealed to this Court from the judgment granting the motion to dismiss the complaint, and on March 19, 1948, this Court entered a decision and [fol. 105] judgment affirming the judgment below. This Court is the highest court of Nebraska in which a decision in this suit can be had, and this Court's decision and decree in this cause is final.

4. In this cause there was drawn in question the validity of the so-called "Anti-Closed-Shop Amendment" to the Nebraska Constitution, adopted in 1946, on the ground that said Amendment was repugnant to the Constitution and Laws of the United States; and the decision of this Court was in favor of the validity of such Amendment, notwithstanding your petitioners' contention, made both before the trial court and this Court, that the said Amendment violated the First and Fourteenth Amendments to the United States Constitution and Article I, Section 10, thereof.

5. The errors upon which your petitioners claim to be entitled to an appeal are more fully set out in the assignment of errors, filed herewith, pursuant to Rules 9 and 46 of the Rules of the Supreme Court of the United States; and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States, as provided by Rules 12 and 46 of the Rules of the Supreme Court of the United States, which statement demonstrates that the federal questions are substantial and that the issues are of sufficient importance to warrant, indeed to require, consideration and determination by the Supreme Court of the United States:

Wherefore, your petitioners pray for the allowance of an appeal from the said Supreme Court of Nebraska, the highest court of said state in which a decision in this cause can be had, to the Supreme Court of the United States, in order that the decision and judgment or decree of the said Supreme Court of Nebraska may be examined and reversed, and also pray that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of Nebraska, under his hand and seal [fols. 106-107] of said Court, may be sent to the Supreme

Court of the United States, as provided by law, and that an order be made touching the security to be required of the petitioners, and that the bond for costs tendered by the petitioners be approved.

Bernard S. Gradwohl, Sharp Building, Lincoln 8, Nebraska; J. Albert Woll, Herbert S. Thatcher, James A. Glenn, 736 Bowen Building, Washington 5, D. C., Counsel for Petitioners.

Dated this 1st day of April, 1948.

[File endorsement omitted.]

[fol. 108] IN THE SUPREME COURT OF NEBRASKA

[Title omitted]

ASSIGNMENT OF ERRORS—Filed April 1, 1948

Come now the above named appellants, and as appellants to the Supreme Court of the United States from the decision and judgment or decree heretofore entered herein, assign as error the following:

1. The Supreme Court of Nebraska erred in failing to hold that the so-called "Anti-Closed-Shop" Amendment, by forbidding appellants under any and all circumstances, to enter into any type of union-security agreement and by denying the union appellants their only proven and practical method of protecting their standards, stabilizing their gains, and obtaining an adequate share of the joint product of capital and labor, among other things, deprived such appellants of rights, liberties and freedoms protected under [fol. 109] the Fourteenth Amendment to the United States Constitution, and in failing to hold that such absolute and unconditional proscriptions against entering into union-security agreements contained in the "Anti-Closed-Shop" Amendment were arbitrary, unreasonable, excessive and without rational basis.

2. The Supreme Court of Nebraska erred in failing to hold that said "Anti-Closed-Shop" Amendment arbitrarily

and unreasonably impaired the obligations of contracts entered into prior to the adoption of the said Amendment, to which contracts several of the appellants were parties, all in violation of Article I, Section 10, of the United States Constitution.

3. The Supreme Court of Nebraska erred in failing to hold that said "Anti-Closed-Shop" Amendment, by favoring non-union workers over union workers, and by permitting employers to retain all their traditional methods of consolidating gains against competition of other employers and against demands of organized labor, while denying to union members their one method of improving their conditions and consolidating their gains against the competition of non-union workers and against the competition of employers for a fair share in the national income, all without providing an adequate substitute method, deprived the union appellants of the equal protection of the law, contrary to the Fourteenth Amendment to the United States Constitution.

4. The Supreme Court of Nebraska erred in failing to hold that said "Anti-Closed-Shop" Amendment, by outlawing the union-security agreement, and thus imperiling the very existence of labor organizations and their ability adequately to function in the interests of working people, restrained the union appellants in the exercise of fundamental rights of working people protected as a concomitant of the rights of speech and assembly under the First Amendment, and protected against invasion by the State under [fols. 110-161] the Fourteenth Amendment.

5. The Supreme Court of Nebraska erred in holding that the said "Anti-Closed-Shop" Amendment is constitutional, valid and enforceable, both on its face and as applied in the present case, under the First and Fourteenth Amendments to the United States Constitution and Article I, Section 10, thereof; in failing to hold to the contrary; in affirming the judgment of the trial court dismissing appellants' complaint; and in failing to grant the relief requested.

Wherefore, on account of the errors hereinbefore assigned, petitioners pray that the said decision and decree of judgment of the Supreme Court of Nebraska, dated the

19th day of March, 1948, in the above entitled cause be reversed and judgment entered in favor of these appellants.

Bernard S. Gradwohl, Sharp Building, Lincoln 8, Nebraska; J. Albert Woll, Herbert S. Thatcher, James A. Glenn, 736 Bowen Building, Washington 5, D. C., Counsel for Petitioners.

Dated this 1st day of April, 1948.

[File endorsement omitted.]

[fol. 162] IN THE SUPREME COURT OF NEBRASKA

[Title omitted]

ORDER ALLOWING APPEAL—Filed April 3, 1948

The petition of Lincoln Federal Labor Union ~~#19129~~, American Federation of Labor, Nebraska State Federation of Labor, and Henry Reichel, individually and as President of said Lincoln Federal Labor Union ~~#19129~~, the appellants in the above entitled cause, for an appeal in the above cause to the Supreme Court of the United States from the decision and decree of the Supreme Court of Nebraska, having been filed with the Clerk of this Court and presented herein, accompanied by assignments of error and statement as to jurisdiction, all as provided by Rule 46 of the Rules of the Supreme Court of the United States, and the record in this cause having been considered, it is hereby

Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from the final decision and decree, dated the 19th day of March, 1948, of the [fols. 163-164] Supreme Court of Nebraska, as prayed in said petition, and that the Clerk of the Supreme Court of Nebraska shall, within forty days from this date, make and transmit to the Supreme Court of the United States, under his hand and the seal of said Court, a true copy of the material parts of the record herein, which shall be designated by praecipe or stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

It is further ordered that the said appellants shall give a good and sufficient bond for costs in the sum of \$1000.00 Dollars, that said appellants shall prosecute said appeal to the effect and answer all costs if they fail to make their plea good.

Robert G. Simmons, Chief Justice of the Supreme Court of Nebraska.

Dated this 3rd day of April, 1948.

[File endorsement omitted.]

[fols. 165-167] Citation in usual form showing service on Ralph W. Sloenn, et al., filed April 8, 1948, omitted in printing.

[fols. 168-171] Bond on appeal for \$1,000.00 approved and filed April 6, 1948; omitted in printing.

[fol. 172] IN THE SUPREME COURT OF NEBRASKA

[Title omitted]

STIPULATION FOR TRANSCRIPT OF RECORD—Filed April 8, 1948

To the Clerk of the Supreme Court of Nebraska:

Kindly prepare for transmittal to the Supreme Court of the United States a true copy of the entire record in this case, both as on appeal to this Court and to the Supreme Court of the United States, and including the decision and decree or judgment of the Supreme Court of Nebraska. More specifically, such record shall include the following:

1. Petition.
 2. Motions of defendants Northwestern Iron and Metal Company and Dan Giebelhouse and of intervenor Nebraska Small Business Men's Association for judgment on the pleadings.
 3. Demurrer of State of Nebraska.
- [fol. 173] 4. Memorandum and order granting motion on pleadings and demurrer.

5. Petition in intervention and order allowing same.
6. Judgment; Motions for New Trial and Order Overruling same.
7. Notice of Appeal; and Cash Deposit of \$75.00.
8. Appellants' Assignment of Errors (as appears in brief or otherwise).
9. Decision of Supreme Court of Nebraska.
10. Judgment of Supreme Court of Nebraska.
11. Petition for Allowance of Appeal.
12. Assignment of Errors.
13. Statement of Jurisdiction.
14. Bond on Appeal.
15. Proof of Service of Papers required by Rule 12.
16. Order allowing Appeal.
17. Citation to Appellees.
18. Return on Citation to Appellees.
19. Stipulation for Transcript of Record.
20. Notice of Right to File Statement making against Jurisdiction.
21. Proof of Service of Appeal Papers.
22. Clerk's Certificate.
23. Entries Showing Case Submitted to Supreme Court of Nebraska on Briefs and Oral Argument of the Parties.

Respectfully submitted, Bernard S. Gradwohl, Sharp Building, Lincoln 8, Nebraska; J. Albert Woll, [fols. 174-180] Herbert S. Thatcher, James A. Glenn, 736 Bowen Building, Washington 5, D. C.; Counsel for Petitioners.

Dated this 6 day of April, 1948.

Agreed to by Swarr, May, Royce, Smith & Story.

Ralph Soleum, Louis W. Finkelstein, Robert A. Nelson, Asst. Atty. Gen. of Nebraska; Attorneys for Appellees.

[fol. 181] Return to order allowing appeal omitted in printing.

[fol. 182] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 183] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

APPELLANTS' STATEMENT OF POINTS AND DESIGNATION OF
PARTS OF RECORD TO BE PRINTED—Filed April 23, 1948

Come now the appellants and adopt their assignments of error as their statement of the points to be relied upon, and represent that the whole of the record, as filed, is necessary for the consideration of the case, except the duplicate order granting appeal appearing on pp. 159-160 of the record as certified.

J. Albert Woll, Herbert S. Thatcher, James A. Glenn, 736 Bowen Building, Washington 5, D. C.;
Bernard S. Gradwohl, Sharp Building, Lincoln, Nebraska.

Dated this 22nd day of April, 1948.

[fol. 184] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER NOTING PROBABLE JURISDICTION—May 24, 1948

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is assigned for argument following American Federation of Labor et al. vs. American Sash & Door Company et al., No. 626.

Endorsed on Cover: File No. 52,991. Nebraska, Supreme Court. Term No. 761. Lincoln Federal Labor Union #19129, American Federation of Labor, Nebraska State Federation of Labor, et al., Appellants, vs. Northwestern Iron and Metal Company, Dan Diebelhouse, State of Nebraska and Nebraska Small Business Men's Association. Filed April 22, 1948. Term No. 761 O. T. 1947.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 34

228 n 6 278

GEORGE WHITAKER, A. M. DEBRUHL, T. G. EMBLER ET AL., APPELLANTS,

vs.

STATE OF NORTH CAROLINA

APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

FILED MARCH 8, 1949.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 34

GEORGE WHITAKER, A. M. DEBRUHL, T. G. EMBLER ET AL., APPELLANTS,

vs.

STATE OF NORTH CAROLINA

APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

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[fol. 1],

IN SUPREME COURT OF NORTH CAROLINA, NINETEENTH DISTRICT, FALL TERM, 1947

No. 78

STATE

V.

GEORGE WHITAKER, A. M. DEBRUHL, T. G. EMBLER, H. E. SETZER, J. E. ROGERS, FRED BLACK AND R. B. ROBERTSON

From Buncombe

Before Nettles, J., July Term, 1947, Buncombe Superior Court. Defendants appealed

IN SUPERIOR COURT OF BUNCOMBE COUNTY

ORGANIZATION OF COURT—JULY TERM, 1947

Be It Remembered, that a regular term of the Superior Court of Buncombe County for the trial of Civil and Criminal cases was opened and held at the Courthouse in Asheville, North Carolina, on July 7, 1947.

Present and presiding under and by virtue of a commission duly executed from the Executive Department of North Carolina, the Honorable Zeb V. Nettles, Superior Court Judge of the 19th Judicial District of North Carolina.

Present and prosecuting on behalf of the State, the Honorable W. K. McLean, Solicitor of the 19th Judicial District of N. C.

L. E. Brown, Sheriff of Buncombe County, returned into the Court the following venire, duly drawn and summoned to appear on Monday, July 7, 1946, for the purpose of selecting a grand jury therefrom and the remainder to serve as petit jurors: J. O. Lee and 44 others (naming them).

[fol. 2] The names of the remainder of the venire as returned into Court were placed on separate scrolls of paper and placed in a hat and at the direction of the Court, Billy Hart, aged seven years, drew one at a time and the following were chosen to serve as Grand Jurors for the ensuing six months: Hugh F. Felder and seventeen others.

The Court appointed Hugh F. Felder as Foreman of the Grand Jury, and the oath as such was duly administered and the oath of Grand Jurors was duly administered to the remainder. William Rymer was duly sworn as Officer of the Grand Jury and, after sitting for the charge of the Court, the Grand Jury retired to their quarters to transact the business of the Grand Jury.

The remainder of the venire as returned into the Court by the Sheriff were duly sworn as petit jurors, they were as follows: Paul F. Pittillo and 25 others. The oath was duly administered and the Court proceeded to transact the following business:

Case #2778

STATE

VS

GEORGE WHITAKER, A. M. DEBRUHL, T. G. EMBLER, H. E. SETZER, J. E. ROGERS, FRED BLACK AND R. B. ROBERTSON

The Solicitor called the above case, which was an appeal from the Police Court of the City of Asheville. The case had been duly instituted in said court and tried therein. From judgment and sentence, each of the defendants gave notice and duly perfected an appeal to the Superior Court of Buncombe County. The Solicitor stated that he would try on the original warrant issued out of the Police Court, which is in words and figures as follows:

IN THE POLICE COURT OF THE CITY OF ASHEVILLE, N. C.

WARRANT

STATE OF NORTH CAROLINA,

County of Buncombe:

HENRY CALDWELL, on information and belief, maketh [fol. 3] oath that on or about the 20th day of May, 1947, in the City of Asheville, North Carolina, and/or the County of Buncombe, State of North Carolina, that George Whitaker, an employer, and A. M. DeBruhl, an Officer and Agent of the Asheville Building and Construction Trades Council; T. G. Embler, an Officer and Agent of the International Brotherhood of Electric Workers, Local Union

No. 238; and H. E. Setzer, an Officer and Agent of the United Brotherhood of Carpenters and Joiners of America, Local Union No. 384; J. E. Rogers, an Officer and Agent of the Brotherhood of Painters, Paper Hangers, and Decorators of America, Local Union No. 839; Fred Black, an Officer and Agent of the Bricklayers, Masons, and Plasterers, International Union of America, Local Union No. 1; and R. B. Robertson, an Officer and Agent of United Association of Journeymen and Apprentices of the Plumbing and Pipe-Fitting Industry of the United States and Canada, Asheville Local No. 487, all of the aforementioned organizations being labor unions or organizations, did unlawfully and willfully enter into an illegal combination or conspiracy in restraint of the right to work and of trade or commerce in the State of North Carolina and against the public policy of the State of North Carolina, by executing a written agreement or contract by and between said employer and said Labor Unions and Organizations or combinations, whereby persons not members of said unions or organizations are denied the right to work for said employer, or whereby membership is made a condition of employment or continuation of said employment by said employer and whereby said named unions acquired an employment monopoly in any and all enterprises which may be undertaken by said employer are required to become or remain a member of a labor union or labor organization as a condition of employment or continuation of employment by said employer whereby said unions acquire an employment monopoly in any and all enterprises entered into by said employer in violation of House Bill #229, Session 1947, [fol. 4] General Assembly of North Carolina, Chapter 328, 1947 Session Laws of North Carolina, and particularly sections 2-3 & 5 thereof, and Chapter 75 of the General Statutes of N. C., contrary to the form and statutes in such cases made and provided and against the peace and dignity of the State.

H. C. Caldwell, Affiant.

Sworn to and subscribed before me this the 15th day of July, 1947. C. C. Waddell, Deputy Clerk, Police Court.

STATE OF NORTH CAROLINA,

County of Buncombe:

To the Chief of Police or any other lawful officer of the
County of Buncombe—Greetings:

You are hereby commanded to arrest the bodies of George Whitaker, A. M. DeBruhl, T. G. Embler, H. E. Setzer, J. E. Rogers, Fred Black, and R. B. Robertson and them safely keep so that you have them before the Judge of the Police Court at 9:00 A.M. of the next immediately following day, then and there to answer the above charges set forth.

C. C. Waddell, Deputy Clerk of Police Court.

IN SUPERIOR COURT OF BUNCOMBE COUNTY

MOTION TO QUASH WARRANT

The defendants move to quash the warrant upon which they are called for trial for the following reasons:

First: The warrant does not allege a criminal offense against the State of North Carolina.

Second: The law on which such warrant is based or bottomed, to wit, H. B. #229, General Assembly of North Carolina, [fol. 5] line, 1947, Chapter 328, 1947 Session Laws of North Carolina, and Chapter 75 of the General Statutes of North Carolina, is void, illegal and unconstitutional in that:

1. Said law arbitrarily and unreasonably deprives the defendants and others similarly situated of freedom of contract and liberty to employ and of other rights and liberties protected under the 14th Amendment to the U. S. Constitution and under Article I, Section 17, of the Constitution of the State of North Carolina, in violation of the due process clause of the 14th Amendment to the United States Constitution, and Article I, Section 17, of the Constitution of the State of North Carolina.

2. The said law constitutes class legislation and is discriminatory, denying the union defendants and others similarly situated of equal protection of the laws contrary to the 14th Amendment to the United States Constitution and to Article I, Section 17, of the Constitution of the State of North Carolina.

3. The said law impairs and previously restrains the exercise by the union defendants herein of their civil rights.

of assembly and speech guaranteed under the First Amendment as protected against invasion by the State under the 14th Amendment to the United States Constitution.

4. The said law is in conflict with the Labor-Management Act of 1947, in violation of Article VI, Section 2, of the United States Constitution.

Third: No crime under Chapter 75 of the General Statutes of North Carolina or under House Bill No. 229 of the General Assembly of North Carolina, 1947, Chapter 328, 1947 Session Laws of North Carolina, has been committed under the facts set forth in such warrant.

Motion denied — defendants except.

Defendants' Exception No. 1.

[fol. 6] IN SUPERIOR COURT OF BUNCOMBE COUNTY

PLEA OF NOT GUILTY

Plea: Defendants plead not guilty.

IN SUPERIOR COURT OF BUNCOMBE COUNTY

JURY AND VERDICT

To try the guilt or innocence of the defendants comes the jury of the following good and lawful men: J. O. Hill and eleven others.

Same being duly sworn and impaneled, the trial of the case proceeds.

The jury heretofore impaneled to try this case returns into open Court, and for its verdict, says: That the defendants are guilty of violating the provisions of House Bill No. 229, 1947 Session of the General Assembly of N. C., Chapter 328—1947 Session Laws of North Carolina, and Chapter 75 of the General Statutes of North Carolina, as charged in the warrant.

MOTION TO SET ASIDE VERDICT AND FOR NEW TRIAL

Upon coming in of the verdict the defendants move to set the verdict aside as against the greater weight of the evidence and for a new trial for errors assigned and to be assigned. Motion overruled. Defendants except.

Exception No. 4.

IN SUPERIOR COURT OF BUNCOMBE COUNTY

MOTION FOR AN ARREST OF JUDGMENT

The defendants move for an arrest of judgment for the following reasons:

First: The warrant does not allege a criminal offense against the State of North Carolina.

Second: The law on which the warrant is based or bottomed, to wit, House Bill No. 229, General Assembly of North Carolina, 1947, Chapter 328—1947 Session Laws of North Carolina, and Chapter 75 of the General Statutes of North Carolina, is void, illegal and unconstitutional in that:

1. Said law arbitrarily and unreasonably deprives the defendants and other similarly situated of freedom of contract and liberty to employ and of other rights, liberties protected under the 14th Amendment to the U. S. Constitution, and Article I, Section 17, of the Constitution of the State of North Carolina, in violation of the Due Process Clause of the 14th Amendment to the United States Constitution, and Article I, Section 17, of the Constitution of the State of North Carolina.

2. The law constitutes class legislation and is discriminatory, denying the union defendants and others similarly situated of equal protection of the laws contrary to the 14th Amendment to the United States Constitution, and to Article I, Section 17, of the Constitution of the State of North Carolina.

3. The said law impairs and previously restrains the exercise by the Union defendants herein of their civil rights of assembly and speech guaranteed under the First Amendment as protected against invasion by the State under the 14th Amendment to the United States Constitution.

4. The said law is in conflict with the Labor-Management Act of 1947, in violation of Article VI, Section 2, of the United States Constitution, and Article I, Section 17, of the Constitution of North Carolina.

Third: No crime under Chapter 75 of the General Statutes of North Carolina, or under House Bill No. 229 of the General Assembly of North Carolina, 1947, Chapter 328—

1947 Session Laws of North Carolina has been committed under the evidence herein.

Motion denied. Defendants except.

Exception No. 5.

IN SUPERIOR COURT OF BUNCOMBE COUNTY

JUDGMENT

Upon the defendants being found guilty of the crime charged in the warrant by the jury, the judgment of the Court is that the defendants each pay a fine of \$50 and each pay one-seventh of the costs of this action to be taxed by the Clerk.

[fol. 8] To the foregoing sentence and judgment the defendants and each of them, in apt time in open Court, objected and; upon the objection being overruled, the defendants and each of them in apt time excepted.

Exception No. 6.

IN SUPERIOR COURT OF BUNCOMBE COUNTY

APPEAL ENTRIES

Upon coming in of the verdict the defendants move to set the verdict aside as against the greater weight of evidence, and for a new trial, for errors assigned and to be assigned. Motion overruled, and defendants except to the judgment pronounced by the Court the defendants except and appeal to the Supreme Court. Notice of appeal given in open Court; further notice waived. Appeal bond in the sum of \$50 adjudged sufficient. Appearance bond in the sum of \$300 adjudged sufficient. By consent the defendants allowed 20 days in which to make and serve case on appeal, and 10 days thereafter allowed the State to file counter-case.

This the 17th day of July, 1947.

Zeb V. Nettles, Judge Presiding.

IN SUPERIOR COURT OF BUNCOMBE COUNTY

Statement of Evidence

STATE'S EVIDENCE

H. C. Caldwell, on Direct Examination by Solicitor McLean, testified:

My name is H. C. Caldwell. I am a member of the Detective Force of the City of Asheville. I know each and all of the defendants. On July 14, 1947, I talked with all of the defendants together in regards to a contract they signed on the 20th day of May, 1947. Each and every one of the defendants were present and the statements made by them were in the presence of each other. There was present Mr. George Whitaker—he is a local building contractor engaged in local construction work and has been such for many years and is an employer; A. M. DeBuhl, an Officer and Agent of the Asheville Building and Construction Trades Council; J. G. Embler, an Officer and Agent of the International [fol. 9] Brotherhood of Electric Workers, Local Union No. 238; H. E. Setzer, an Officer and Agent of the United Brotherhood of Carpenters and Joiners of America, Local Union No. 384; J. E. Rogers, an Officer and Agent of the Brotherhood of Painters, Paper Hangers, and Decorators of America, Local Union No. 839; Fred Black, an Officer and Agent of the Bricklayers, Masons and Plasterers International Union of America, Local Union No. 1; and R. B. Robertson, an Officer and Agent of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Asheville Local Union No. 487; I know that the organizations which I have just named are all labor unions or organizations all affiliated with the American Federation of Labor and that each have local unions in Buncombe County, North Carolina with a total membership of approximately 1,260. The defendants who are named in the warrant admitted to me that they had signed the contract dated May 20, 1947, and that they had signed this document.

The defendant George Whitaker stated in the presence of the other defendants that he was a contractor engaged in local building construction and that he did not employ anybody except union labor, had not since the passage of House Bill No. 229 and did not intend to hire any employees or

use any sub-contractors on any of his contracts in the future unless the sub-contractors were members of the Asheville Building and Construction Trades Council of the City of Asheville, North Carolina, which is a labor organization and that every employee who worked for him had to have a union card or they could not work for him and had not worked for him since the passage of House Bill No. 229, Chapter 328, Session Laws of North Carolina, 1947.

Mr. Whitaker stated that he denied any person the right to work for him unless he was a member of one of the unions mentioned in his contract and that he made it a condition of employment or continuance of employment by him that every [fol. 10] employee either hired by him or a sub-contractor become or remain a member of a labor union or labor organization as a condition of employment or continuation of employment by him.

I asked Mr. Whitaker if he knew that the contract which he had signed gave the members of the unions mentioned therein exclusive employment rights in any and all enterprises entered into by him as a contractor and his answer was yes, that he intended to make it exclusive so far as his employment was concerned; that he had always been a union contractor engaged in building only honest construction and that he had found through many years that the only way to give the best honest construction service was by exclusively employing nothing but union labor.

The other defendants, A. M. DeBruhl, T. G. Embler, H. E. Setzer, J. E. Rogers, Fred Black and R. B. Robertson stated that each signed the contract personally and as an officer and agent of their respective unions and on behalf of such unions and that the written agreement or contract which has been offered by the State as State's Exhibit No. 1 denied persons not members of their unions or organizations the right to work for the defendant Mr. Whitaker and that it made a condition of employment or continuation of employment by the employer that every person had to pay their dues, fees or other charges and be a member in good standing or they could not work for the defendant Mr. Whitaker. The defendants each said that the contract provided for it and they knew that the contract required every person working on any of Mr. Whitaker's jobs to become or remain a member of a labor union or labor organization and that since the contract had been executed Mr. Whitaker and

the defendants had advised every person who wanted employment that they must have their union card or stay off of Geo. Whitaker's job because he had a closed shop contract with these defendants and the unions which they represent.

[fo]. 11] (No Cross Examination).

STATE'S EXHIBIT No. 1

The State offers in evidence *State's Exhibit #1* as follows:

STATE OF NORTH CAROLINA

County of Buncombe:

This Agreement, Made and entered into this the 20th day of May, 1947, by and between George Whitaker, hereinafter called the Employer, and the Building and Construction Trades Council of Asheville and Vicinity; International Brotherhood Electrical Workers, Local Union No. 238; Brotherhood Carpenters and Joiners of America, Local Union No. 384; Brotherhood Paper Hangers, Painters and Decorators, Local Union No. 934; Bricklayers, Masons and Plasterers International Union Local No. 1; and Local Union #487 United Association of Journeymen, Plumbers, Steam Fitters and Helpers of America, all affiliated with the American Federation of Labor, hereinafter called the Labor Unions of Asheville, N. C.:

Witnesseth: In consideration of the mutual promises hereinafter named, the parties hereto agree as follows:

Recognition of Labor Unions

1. The employer agrees to recognize the Labor Unions of Asheville and vicinity as the spokesman of the workers in the industry and the representative of the respective trades taken collectively.

Employment

1. The employer agrees to employ none but union members affiliated with the Building and Construction Trades Council, composed of the various labor unions herein mentioned.

2. The employer further agrees to provide in their specifications when doing any business with sub contractors, that

[fol. 12] sub-contractors will use, none other than, members of the respective unions affiliated with the Building and Construction Trades Council.

3. The use of members in good standing of the Labor Unions by the employer includes skilled, semi-skilled and unskilled labor on all work now and hereafter being done, directly and indirectly by the employer.

4. The employer agrees to abide by all the rules and regulations of the respective trades affiliated with the Building and Construction Trades Council, and to comply with the rates of wages and the specified hours as recognized by the respective trades. In the event that the employer should engage sub-contractors to perform such work, then the employer agrees that such sub-contractors will observe hours, wages and working conditions as recognized by the different trades.

5. It is agreed by and between the employer and the Labor Unions that both will exert every honorable means toward the execution of this agreement, and will cooperate in every possible way toward furthering the interests of both parties hereto.

6. In consideration of the above, the Labor Unions concede the right of the employer to discharge any employee for incompetency, intoxication, or other just cause.

7. The Labor Unions further guarantee that no strike or picketing shall take place until after all efforts to settle differences have been exhausted.

8. An Arbitration Committee, when found necessary, shall be composed of one representative of the Employer and one of the Council, they to select a third member, Representative of each trade involved in the dispute or difference, to have a seat in the proceedings and decision of the [fol. 13] Arbitration Board to be final and binding.

District

This agreement is to cover the entire district under jurisdiction of this Council, which is half way to the next Council in any direction.

Duration of Agreement

1. This agreement shall be into effect on the 25th day of May, 1947, and shall remain in full force and effect until the 25th day of May, 1949, and shall continue from year to year unless either party expresses a desire for a change ninety days prior to any annual termination date.

In Witness Whereof the Employer has hereunto set his hand and seal, and the Labor Unions of Asheville have executed the within agreement by and through their respective duly authorized agents, with the seals of each union hereto attached, all by order of the Labor Unions duly given in regular meetings assembled.

George Whitaker, Employer; Asheville Building and Construction Trades Council, by Arthur M. DeBruhl, Business Manager; International Brotherhood Electric Workers, Local Union No. 238, by T. G. Embler, President; Brotherhood Carpenters and Joiners of America, Local Union No. 384, by H. E. Setzer, Business Manager; Brotherhood Paper Hangers, Painters, and Decorators, Local Union No. 934, by J. E. Rogers, Business Manager; Bricklayers, Masons and Plasterers International Union Local No. 1, by Fred Black, Secretary-[fol. 14] Treasurer; Local Union #487, United Association of Journeymen, Plumbers, Steam Fitters and Helpers of America, by R. B. Robertson, Business Manager. (Seal.)

The State Rests.

DEMURRER AND MOTION FOR JUDGMENT OF NONSUIT

Defendants demur to the evidence and move for judgment as of nonsuit. Motion denied. Defendants except.

Exception No. 2

DEFENDANTS' EVIDENCE

C. A. Fink, on Direct Examination by George Pennell, testified for defendants:

My name and address is C. A. Fink, Spencer, North Carolina. I am President of the N. C. State Federation of Labor. I have been a member of the trades union movement for

thirty years and for ten years was Treasurer of my local. I have been a member of the Shop Committee for my own local for 25 years, which belongs to the International Brotherhood of Electrical Workers. I was president of the Salisbury, North Carolina Central Labor Union for ten years and served as a member of the State Federation of Labor for thirteen years, and for ten consecutive years I have been President of the North Carolina State Federation of Labor, being elected annually.

During this period I made a study not only from a theoretical standpoint but a comprehensive study from the actual factual situation which has embraced the employments of tens of thousands of working people approximating a total of more than a million over a ten-year period. The staff of the American Federation of Labor and the State Federation of Labor have made in North Carolina with reference to Union Shop or Union Security Agreements most extensive studies.

[fol. 15] We have in our libraries hundreds of books, pamphlets, reports, graphs and statistical data on this subject. It includes official reports and surveys of the U. S. and the North Carolina Departments of Labor, and those of the various manufacturing associations, Chambers of Commerce and other organizations. We make a special effort to make an honest study of the facts collaborated by what might be termed as our opposition.

We maintain a staff of nine members including statisticians and experts on economies and social case work, both white and colored, who are constantly endeavoring to get all the facts, without prejudice, for, any movement not founded on truth will sooner or later fall.

Based upon my long active experience and studies of the trade union movement, I know the influences and effect of union shop or union security agreements upon the economic welfare of the citizens of the State.

Union shop or union security agreements constitute the most effective means of obtaining and securing for labor organizations, their members, and the individual union members for it guarantees:

Job security and protection from employer discrimination by removal of motives to discharge or demote because of union activity.

Equality of bargaining power, with consequent betterment of working conditions by insuring labor a united front in the contest for a fair share of the joint products of capital and labor.

Protection of working standards by preventing cut-throat wage competition by non-union employees.

Equality of sacrifice by insuring that all who enjoy union wages and working conditions, achieved through years of struggle and deprivation, share in the costs of such benefit [fol. 16] fits as members of the union rather than as "free riders."

An increased measure of union responsibility for their obligations under collective bargaining agreements by providing a means of imposing disciplinary action, and an ability effectively to police collective bargaining agreements to the end of obtaining full compliance on the part of the employees embraced thereunder, it being impossible to secure such full compliance where some employees are not union members and thus not subject to union laws and discipline.

Elimination of jurisdictional strife by safeguarding against raids and other disruptive tactics of rival labor organizations.

And, finally, security and maintenance of organization once it has been achieved thereby promoting labor-management cooperation by eliminating the suspicion and hostility which often characterizes the initial stages of employer recognition and freeing union energies and resources for constructive cooperation rather than defensive sparring.

(No cross-examination.)

George Whitaker, one of the defendants, testified, on Direct Examination by George Pennell:

My name is George Whitaker. I am one of the defendants in this case. I am described as an employer in the warrant and admit I am an employer of Labor. I am engaged in the business of building contractor, engaged in local building construction and repair. I have had experience as an employer, with labor organizations under Union Security Agreements. For thirty years I have been engaged in building construction and have dealt with unions during that period.

Based upon my experiences as I know the effects of union security agreements on the economic welfare of North Caro. [fol. 17] lina from the employers' viewpoint, I have found that union security agreements result in stability of employment relationships, the promotion of harmony and cooperation as between employer and employees, the elimination of strife and discord both within the plant and as between rival labor organizations, the making available of sufficient skilled, competent and experienced artisans through the training of apprentices, the stabilization of employee's compensation by the predetermination of applicable wage rates, all having the effect of and actually resulting in increasing production.

I find I get the best skilled workmen for each member has had to stand a rigid examination, as to his qualifications to do the job.

In some cases such as the Electricians, Plumbers, and Steam Fitters, the law requires Certificates of Proficiency, while in other cases there is no law requiring examinations, but the trade unions of their own volition require examinations after service as apprentices.

These examinations and certificates of efficiency to a marked degree afford the employer safety and the satisfaction that he can safely guarantee his contract as being in compliance with the law of contracts and building codes both municipal and state-wide.

A contract with the Building Trades Council relieves a contractor of all work and worry in assembling a force and obtaining skilled men of the various trades, for example, if a contractor needs six additional electricians, all that he has to do is to call on the Business Agent for the requisite number and they are supplied.

One of the greatest benefits is that when a contractor is about to bid on any job, he can obtain wage scales, working hours, and conditions, of every craft he will need for the proposed bid, and whether or not such labor will be available [fol. 18] able, for without labor of proper education, qualification and ability the employer cannot move an inch, by union security agreements the contractor is assured that during the period the cost of construction for labor will not be changed or altered, and he can with a reasonable degree of certainty make an intelligent bid on the proposed construction.

All the time the contractor has the right to discharge any employee for incompetency, indifference, intoxication, or other justifiable reasons.

(No Cross-examination.)

A. E. Brown, on Direct Examination by George Pennell, testified for defendants:

My name and address is: A. E. Brown, Durham, North Carolina. I am an organizer for the American Federation of Labor assigned to the State of North Carolina, in charge of Labor Union matters in the State.

I have had 29 years experience in connection with employer and labor contracts within the State of North Carolina.

I became a member of the Tobacco Workers Union in 1918, was Secretary for four years, and later was elected for seven terms as President of Durham Central Labor Union. For the past eight years I have been on the staff of the A. F. of L. as full time Organizer assisting Labor Organizations throughout the State in the negotiation of contracts and the settlement of disputes or disagreements but my experience as a conciliator in strikes is extremely limited since such things as strikes in the A. F. of L. in N. C. are very rare, and exceptional.

I have made extensive investigation, survey and study of the economic conditions within the State of North Carolina with particular reference to union security agreements. The nature of my work has made it essential that I keep informed through experience and study of economic conditions within our State, in particular reference to Union Security Agreements. This is necessary to intelligently negotiate Union Security Agreements with a particular employer. Our success in negotiating an agreement depended largely upon our ability to furnish the employer with comparable conditions with other employers wherein a mutual advantage could be obtained through a Union security agreement. I have negotiated management-labor contracts resulting in management paying to N. C., with the assistance of the research staff of the N. C. State and the American Federation of Labor, workers over two hundred million dollars.

There are approximately 234 Union Security Agreements with all labor organizations operating, within the State of North Carolina, as of March 1, 1947.

There are four types of Union Security Agreements. The Closed Shop, Union Shop, Maintenance of Membership and the Check Off of Dues.

A closed shop agreement is one in which the employers and the unions agree, by mutual consent, that all employees covered by the agreement must be members of the Union. The Union Business Agent is to act as referral agent for the employer, whenever called upon by the employer for additional employees. All employment is handled by the Union's Representative, better known as Business Agent or Business Manager.

By the term Union Shop, the employer agrees with the Union, that as a condition of employment, after a probationary period, if the employee is satisfactory he is required by the employer to become and remain a member of the union for the term of the agreement, this gives the employer the right to hire any one he may desire to employ, but does require that such employee support the Union by joining [fol. 20] after the probationary period and then to remain a member for the duration of the agreement. This affords the employer a more simple method of handling grievances through group representation, but each individual employee has the right to take up his grievances himself personally if he desires to.

As to maintenance of Membership, there is the requirement that after an employee has voluntarily joined a union that is party to a contract with the employer, the employee is required, by mutual agreement between the employer and the union, to remain a member in good standing for the duration or life of the agreement.

The number of employees covered by the various types of Union Security Agreement with all labor organizations operating in North Carolina is approximately 54,000 employees. There are, according to the latest available figures from the North Carolina Department of Labor as of February 1, 1947, 735,000 Employees in Non-Agricultural work.

Less than 8% of the total number of gainfully employed non-agricultural employees are embraced under union security agreements, embraced in the manufacturing group:

as of February 1, 1947; there was approximately 400,000 embraced in the non-manufacturing group as of February 1, 1947, there were approximately 335,000.

All organizations holding union security agreements within the State freely admit all qualified applicants into membership.

The requirements made as a condition to membership will take some explanation. In numerous skilled trades the union requires as a condition of membership that the applicant furnish proof that he is fully qualified to perform the duties of a Journeyman Mechanic in the union of the trade of which he seeks membership. Some organizations have [fol. 21] examining committees and subject the applicant to an examination as to his fitness and ability to work at the trade which he seeks to enter as a union Journeyman. In some trades the law requires that they take an examination of the applicant before he is permitted to work at the trade. These rigid examinations are in the interest of public health and public safety. I mention specifically the Electrical Workers' trade, wherein there is constant danger of fire hazards, severe burns and death by electrocution, when incompetent and inexperienced Electricians do installation work. In the matter of plumbing the health of the public is placed in serious danger when incompetent and inexperienced persons install plumbing fixtures. Also from the steam fitting side of the trade there is definite danger of heavy property damage, loss of life and limbs of an explosion from a lack of knowledge of the proper pressure that a certain type of installation can carry safely. For example a contractor on a public school or federal building where specifications are strict and inspection rigid, the contractor is prohibited from employing workmen except those who have passed satisfactory trade examinations.

In the printing trades full apprenticeship service is required as a condition of membership in order to provide employers with skill, capable and expert workmen who can proficiently serve these trades. In manufacturing plants, the employer usually puts a new employee to work on probation and if at the end of the probationary period the employer is satisfied that the employee has demonstrated his ability then the union accepts his application and votes membership to such persons. In these instances the employer is the one who passes on applicant before the union will receive him.

As to the unions' specific requirements, each member is required to pay a reasonable initiation fee and to pay reasonably monthly dues to be in good standing with the [fol. 22] union. The costs vary on various trades and crafts according to skill, wage rates, death benefits, life insurance, old age benefits, and homies for the aged members to spend their declining years when unable to work longer at their trades. A considerable percent of union dues go to the reserve insurance offered by the union to all its membership which are controlled by the insurance laws of the nation. No labor organization operating within the State which holds union security agreements arbitrarily expel members from membership in the union where such expulsion would mean loss of job under union security agreement.

Each and every A. F. of L. union has in its constitution and by-laws that a member cannot be arbitrarily expelled by anyone or any group except when charges are duly filed in open meeting against a member and then he is given due notice of such charges, and the entire membership is informed of the date set for hearing the charges in open meeting against the member. It is further provided in these constitutions that the member against whom charges have been filed must be represented by counsel, selected by himself, or appointed by the President of the Local Union, if the member fails to retain counsel, and the person so charged given every opportunity to present whatever evidence he and his counsel may desire.

The members of the union present sit as a jury of the whole, and they render the verdict of guilt or innocence, according to the evidence and should the member be dissatisfied with the decision he has a right of appeal to his International and at its hearing to appear in person and be represented by counsel.

I know the various labor union organizations who are involved in the contract offered by the State as its Exhibit #1 and who are described in the warrant issued in the cause. The set-up or activities of the various organizations involved in the contract offered by the State, as Exhibit No. [fol. 23] 1, beginning with the Asheville Building Trades Council, is a Federation of the several trades engaged in building and construction work, in the Asheville jurisdiction. It is chartered by the Building and Construction Trades Department of the American Federation of Labor. It is a

voluntary Federation of the Trades involved, and any trade can withdraw from the council at any time the local union of that trade decides. The purpose of a building trades council is obtaining through this federation closed shop agreements with contractors by pooling the interest of all the local unions constituting the building Trades Council. The Council also serves a good purpose for the contractors in that the contractors may obtain at all times the necessary number of skilled mechanics of any of the Building Trades through the Council that he may need.

Embraced in the membership of the Building Trades Council are the following trades: Asbestos Workers, Bricklayers, Iron Workers, Carpenters and Joiners, Electrical Workers, Operating Engineers, Hod Carriers, Lathers, Sheetmetal Workers, Painters and Paperhangers, Plasterers, Plumbers and Steam Fitters, Roofers, Elevators, Constructors, Tile, Terrazo and Marble Setters, Teamsters and Chauffeurs, Stone Cutters and Granite Cutters, the total of nineteen.

The printing trades Council is a federation of the printing trades unions, consisting of the Typographical Union, the Pressmen's Union, the Stereotypers Union, the Photo Engravers Union, and the Mailers Union, the purpose of this council is to serve the printing trades in a similar manner as the above mentioned Trades serves the trades that do building. In a like manner, the metal trades have a similar federation or counsel for the metal trades. There are numerous miscellaneous trades such as the service trades, furniture factory employees, textile workers, and unions not [fol. 24] embraced within the above mentioned trades, all of these and all of the above mentioned trades have central representation in the City Central Labor to serve all A. F. of L. Unions indiscriminately. While the particular councils above mentioned are legislative bodies for the specific trades embraced in each council, the Central Labor Union is the legislative body for all A. F. of L. Unions in the jurisdiction of the Central Labor Union. In turn all of the Central Labor Unions of the cities and all A. F. of L. Local Unions in the State are federated into the N. C. State Federation of Labor.

The number of union security agreements within the State involved in the respective organizations named in the contract and described in the warrant, as of March 1st, 1947, is 59.

The number of employees embraced in the agreements with the Building Trades Council of the State, locally, are approximately 7,000 in the entire State of North Carolina, and in the contract involved in this case are approximately 1,260 members, the Building Trades Council in the State of North Carolina have Closed Shop agreements only. A uniform type of closed shop agreement is used in the Building Trades Council of North Carolina, and the contract offered in evidence as the State's Exhibit #1 is the usual accepted type of contract used in the nineteen trades composing the Building Trades Councils in North Carolina. They are all drawn in accordance with a standard form but there may be a few deviations on minor matters in isolated instances.

No labor organization operating within the State exercises or possesses any monopoly in the supply of labor in any craft, trade or occupation in any city, county or area within the State by reason of any union Security agreement.

(No cross-examination.)

[fol. 25] JAMES F. BARRETT, on Direct Examination by George Pennell, testified for defendants:

My name is James F. Barrett. I was born in Madison County, North Carolina. My residence is Asheville, North Carolina. My occupation is Southern Publicity Director for the American Federation of Labor.

I have been in the Trades Union Movement for 38 consecutive years, except during World War I. I was called by the Secretary of Labor for full time service and assigned to President Wilson's Speaker's Bureau, and during World War II, my employer, the American Federation of Labor, was requested by the Secretary of the Treasury, to release me for employment by his Department, which request was granted, and I was appointed an Assistant Director of War Bond Sales, and assigned to Pay Roll Deduction Division.

I have made a detailed study of the labor situation in North Carolina, with particular reference to Union Security agreements, strikes over Union Security agreements, and general abusive practices, such as is defined by the Courts, and I know the labor situation in this State. North Carolina has been so remarkably free from labor abuses,

costly conflicts and disturbances that Governors of our State, leading legislators, newspaper editors, educators, and numerous others have made frequent public mention of the happy state of affairs upon numerous occasions. The North Carolina State Federation of Labor now has and always has had since its organization men in executive positions of the Federation of the very highest type of citizenship. There has never been one single instance in North Carolina where an AFL Local Union has abused its power, to the hurt of any man, woman, company, corporation, or community.

On the other hand, the State Federation of Labor, our City Central Labor Unions, our Building Trades Councils, Printing Trades Councils and Local Unions have supported every national state and community enterprise launched for [fol. 26] protection of our citizens and the advancement of the interests of all people.

There is not an instance in the history of North Carolina where any AFL Union ever demanded of any employer such a thing as featherbedding. Under methods of modern industry, wherein specialists are employed by management to make time study of each and every operation in order to drain and draw from the working man or woman the last ounce of energy in order for that worker to make production, there is no featherbed. As for demanding of an employer that a stand-in be employed for any reason, such request or demand has never been heard of in the State of North Carolina.

There has been a general practice in this State of using "standby" workers, but that sin was committed by Industry, and not by the workers. Power companies have pursued the policy of having stand-by men on duty call when they were not being paid for same. The worker performed his 8 hours' labor, and then was directed not to leave his home telephone during the 16 hours off, as he might be needed at a moment's notice. Such men were really on duty 24 hours a day, while getting pay for 8 hours.

There are, according to latest official compilation of the State Department of Labor, 718 textile, rayon and hosiery plants in operation in North Carolina. The workers in less than fifty of these 718 plants are organized, and but comparatively few of plants give job security to these union workers. Our greatest industry is made up of these textiles, rayon and hosiery mills, employment figures ranging

from 175,000 at low production to 225,000 at peak production. Careful analysis shows that less than four per cent of these plants have any kind of union organization, and even in the few organized plants no union contract calls for job security. The employers do all the hiring, and anyone who so desires can get a job in any of these 718 plants who desire to work, providing the employer wants to employ them.

[fol. 27] There are, in round numbers, 4,500 men and women employed by the telephone companies in the State. Not a single job security provision exists between any telephone company and any group of organized workers in the State of North Carolina as far as we can ascertain.

The manufacture of furniture has long been one of the dominant industries in North Carolina. Tens of thousands of workers are employed in our furniture factories. Less than 5% of our furniture workers are organized, thus leaving 95% of that great industry wide open to all who seek employment with not even a shadow of a labor union to endanger the right to work.

None of the workers employed in sawmilling, lumber yards, timber cutting, brick yards, clay products, mica mines, or other mines, and there is no claim or charge that any union denies any one the right to work in any of these extensive activities.

One of the largest groups of employed people in the State is that of the retail clerks, while the merchants of the State are thoroughly organized in the Merchant's Association, there is but one local union with a small membership of retail clerks in the whole State, and that is in Asheville. That the merchants control legislation in this State to the extent that only one bill introduced in the Legislature in the past twenty years has been enacted in opposition to the Merchant's Association. The great army of retail clerks are free, absolutely free, from any union control whatever, and no one can say that they are denied the right to work.

The most effective closed shop agreements in North Carolina are those of the printing trades. Yet there are comparatively few such agreements in existence in this State. Not an agreement exists in these trades west of Charlotte. In Charlotte the two daily newspapers and one commercial shop are under closed shop agreements with the printing trades. The numerous commercial shops in Charlotte, except the [fol. 28] one mentioned, are all open shop and anti union

shop. In Salisbury the daily paper and one commercial shop work under closed shop contract. In Winston Salem the two daily papers and one small commercial shop are closed shop contracts. In Greensboro the two daily papers have closed shop agreements with printing trades. No commercial shop in that City is under contract with the union, all being open shop and anti-union shop. In Durham two daily papers and one commercial shop work under closed shop agreements. In Raleigh the News and Observer work under closed shop, while the Raleigh Times is not only non union but anti-union. Several commercial shops in Raleigh work under closed shop agreements with the printing trades.

In Wilmington one paper is under agreement with printing trades, while the other daily is non-union. No commercial shop in Wilmington is under agreement with the unions.

In High Point the paper is under union agreement, but no commercial shop uses union labor at all.

We have seven counties in North Carolina's one hundred counties with closed shop agreements in part of the printing plants, while none of the cities in these seven counties embrace one half of the journeymen printing tradesmen in each city and county in the union category. This leaves 93 counties in the State of North Carolina with no union at all, and any one desiring to work at the printing trades and not wishing to affiliate with a union have at least 95 chances out of a hundred to work where no union exists.

There is not a local union of laundry workers in the State of North Carolina, except the one contract with Linen Supply. There is not a single union of hotel and restaurant workers in the State. There is no organization of workers whatever in the pressing clubs, cleaners and dyers. Nor is there a single union of building service employees in the [fol. 29] State. There is not one single union of school teachers in the State, nor that of office workers and office employees, except that of the one union in Reidsville plant of the American Tobacco Company and the Wright Automatic Machinery Company at Durham. There is no union in the way of any worker who desires to work in a laundry, pressing club, building service, teaching school or work in an office. Nor is there any union of bank employees, insurance groups, real estate brokers, pawn shops, undertakers, pool rooms, beer parlors, wine shops, dance halls or night clubs.

(No Cross Examination).

OFFERS IN EVIDENCE

Defendants' Exhibit No. 1.

The defendants offered in evidence United States Department of Labor Official Bulletin No. 829, Captioned "Extent of Collective Bargaining and Union Status 1945." Original copies are hereto attached and filed with the Clerk in lieu of mimeographing.

Defendants' Exhibit No. 2

The defendants offered in evidence U. S. Department of Labor - Bureau of Labor Statistics, Official Bulletin "Extent of Collective Bargaining and Union Recognition 1946." Nine original copies are hereto attached and filed with the Clerk in lieu of mimeographing.

[fol. 29-1]

DEFENDANT'S EXHIBIT No. 1

United States Department of Labor
 Frances Perkins, Secretary
 Bureau of Labor Statistics
 Isador Lubin, Commissioner (on leave)
 A. F. Hinrichs, Acting Commissioner

Extent of Collective Bargaining and Union Status,
 January 1945

Bulletin No. 829

[fol. 29-2]

Letter of Transmittal

United States Department of Labor,
 Bureau of Labor Statistics,

Washington, D. C., April 9, 1945.

The Secretary of Labor:

I have the honor to transmit herewith a report on the extent of collective bargaining and union status in effect in January 1945. This study is based on an analysis of approximately 15,000 employer union agreements as well as employment, union membership, and other data available to the Bureau of Labor Statistics.

This study was prepared under the general supervision of Florence Peterson, Chief of the Industrial Relations Divi-

sion. Elizabeth Stark and Philomena Marquardt were in immediate charge of assembling the data.

A. F. Hinrichs, Acting Commissioner.

Hon. Frances Perkins,
Secretary of Labor.

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[fol. 29-3] Bulletin No. 829 of the United States Bureau of Labor Statistics

[Reprinted from the Monthly Labor Review, April 1945, with additional data]

Extent of Collective Bargaining and Union Status,
January 1945¹

Union Agreement Coverage

Some 14¹/₂ million workers were employed under collective-bargaining contracts in January 1945. An analysis by the Bureau of Labor Statistics indicates that these workers included approximately 47 percent of all workers employed in industries and occupations in which unions are actively engaged in obtaining written agreements with employers.

¹ For similar data for previous years see Monthly Labor Review, April 1944, February 1943, May 1942, and March 1939.

² It is estimated that approximately 30¹/₄ million workers were employed in occupations in which unions are actively engaged in organizing and seeking to obtain written agreements. In most industries this includes all wage and salary workers except those in executive, managerial, and certain types of professional positions. It excludes all self-employed, domestic workers, agricultural wage workers on farms employing fewer than 6 persons, all Federal and State government employees, teachers, and elected and appointed officials in local governments.

It should be noted that the number of workers covered by union agreements is not the same as union membership.

During the year 1944 there was an increase in agreement coverage of over half a million workers, which was equivalent to a 4.5 percent rise in the proportion of employed workers covered by agreements.

Manufacturing.—Approximately 65 percent (more than 8 $\frac{1}{2}$ million) of all production wage earners in manufacturing industries were employed under the terms of union agreements at the beginning of 1945, representing an increase during the year of 8 percent in the proportion of employees working under union agreements.

The largest increases in the proportion of workers under agreement were in the tobacco and chemical industries and, to a less extent, in the canned and preserved foods industry. Agreements were negotiated for the first time with several large aircraft and petroleum refining companies, as well as with a number of meat packing, shoe, leather tanning, and rubber companies.

The degree of union organization at the beginning of 1945 varied considerably among the manufacturing industries, although not so much as among nonmanufacturing industries and trades. Over 90 percent of the production wage earners were working under union agreements in the aluminum, automobile, basic steel, brewery, fur, glass, men's clothing, rubber, and shipbuilding industries, in contrast to only a little more than 10 percent in the dairy products industry.

Except under closed- or union-shop conditions, agreements cover nonmembers as well as members employed within the given bargaining unit. On the other hand, some union members may be working in unorganized plants and many civil-service employees and teachers are members of unions but are not employed under the terms of bilateral written agreements.

* Clerical, professional, service, and construction workers, foremen, and truck drivers connected with manufacturing are treated as occupational groups under nonmanufacturing employees.

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[fol. 29-4]

Proportion of Wage Earners Under Union Agreements in January 1945

MANUFACTURING INDUSTRIES

80-100 percent	60-80 percent	40-60 percent	20-40 percent	1-20 percent
Agricultural equipment	Book and job printing and publishing	Baking	Beverages, nonalcoholic	Dairy products
Aircraft and parts	Clocks and watches	Canning and preserving foods	Chemicals, excluding rayon yarn	
Aluminum	Coal products	Dyeing and finishing textiles	Confectionery products	
Automobiles and parts	Electrical machinery, equipment, and appliances	Flour and other grain products	Cotton textiles	
Breweries	Leather tanning	Furniture	Paper products	
Carpets and rugs, wool	Machinery and machine tools	Gloves, leather and cloth	Silk and rayon textiles	
Cement	Millinery and hats	Hosiery		
Clothing, men's	Paper and pulp	Jewelry and silverware		
Clothing, women's	Petroleum refining	Knit goods		
Furs and fur garments	Railroad equipment	Leather luggage, handbags, novelties		
Glass and glassware	Rayon yarn	Lumber		
Meat packing	Tobacco products	Pottery, including china-ware		
Newspaper printing and publishing	Woolen and worsted textiles	Shoes, cut stock and findings		
Nonferrous metals and products		Steel products		
Rubber products		Stone and clay products		
Shipbuilding				
Steel, basic				
Sugar, beet and cane				

NONMANUFACTURING INDUSTRIES—Continued

80-100 percent	60-80 percent	40-60 percent	20-40 percent	1-20 percent
Actors and musicians Airline pilots and mechanics Bus and street car, local Coal mining Construction Longshoring Maritime Metal mining Motion-picture production Railroads—freight and passenger, shops and clerical Telegraph service and maintenance Trucking, local and intercity	Radio technicians Theater—stage hands' motion-picture operators	Bus lines, intercity Light and power Newspaper offices Telephone service and maintenance	Barber shops Building servicing and maintenance Cleaning and dyeing Crude petroleum and natural gas Fishing Hotels and restaurants Laundries Nonmetallic mining and quarrying Taxicabs	Agriculture ¹ Beauty shops Clerical and professional, excluding transportation, communication, theaters, and newspapers Retail and wholesale trade

¹Less than 1 percent.

[fol. 29-5] *Nonmanufacturing.*—About 33 percent (slightly more than 5½ million) of all nonmanufacturing workers were employed under the terms of union agreements at the beginning of 1945, representing an increase during the year of 6 percent in the proportion of employees working under agreement.

Over 95 percent of the coal-mining, maritime and long-shoring, and railroad employees, including clerical and supervisory personnel, and over 90 percent of the employees in the iron-mining and telegraph industries were employed under union agreements.

Nearly 25 percent of the employees in service occupations and slightly less than 20 percent of the clerical and professional employees were under union agreements. A major portion of the clerical and professional workers in the transportation, communications, and public utilities industries and practically all actors and musicians were employed under collective-bargaining agreements. In manufacturing, financial, and business service establishments, and in wholesale and retail trade, only about 13 percent of the clerical and professional employees were under agreement.

Union Status

General Types

The union-status provisions in employer-union agreements can be classified into five general types according to their union-membership requirements and privileges, as well as to the presence or absence of check-off arrangements. The various degrees of union recognition or union security are commonly referred to as closed shop, union shop with or without preferential hiring of union members, maintenance of membership, preferential hiring with no membership requirements, and sole bargaining with no membership requirements. Check-off arrangements are of two kinds, usually referred to as automatic check-off and check off by individual authorization.

Under closed-shop agreements all employees are required to be members of the appropriate union at the time of hiring, and they must continue to be members in good standing throughout their period of employment. Most of the closed-shop agreements require employers to hire through the union unless the union is unable to furnish suitable persons

within a given period, in which case the persons hired elsewhere must join the union before starting to work:

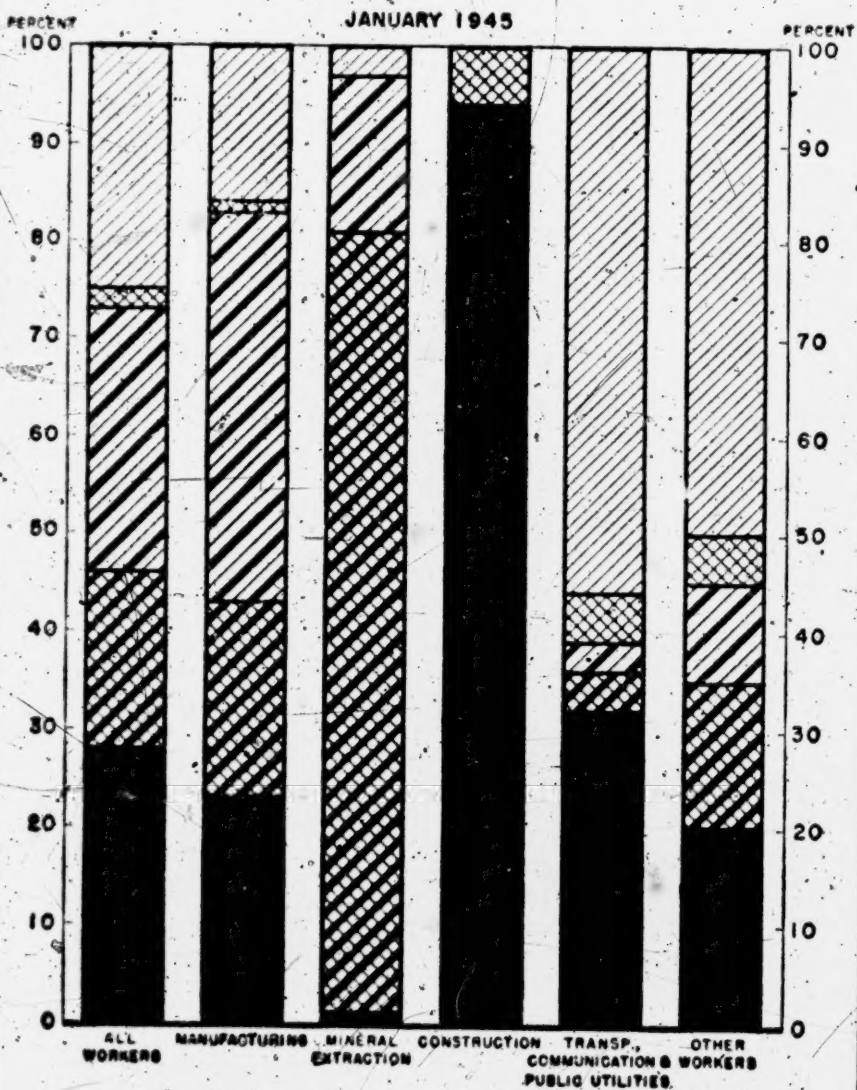
In contrast to closed-shop agreements, a union-shop agreement provides that employers have complete control over the hiring of new employees and such persons need not be union members when hired. They must, however, become members within a specified time, usually 30 to 60 days, as a condition of continued employment. When a union-shop agreement, in addition to requiring that all employees join the union within a specified probationary period, states that union members shall be given preference in hiring, it differs very little in effect from the closed-shop agreement. In a few cases, employees hired before a closed- or union-shop agreement is signed are exempt from the union-membership requirement.

A maintenance-of-membership agreement requires all employees who are members when the agreement is signed, and all who choose later to join the union, to retain their membership for the duration of the agreement. The maintenance-

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CHART 1

PROPORTION OF WORKERS UNDER UNION AGREEMENT BY UNION STATUS PROVIDED MAJOR INDUSTRY GROUPS



KEY TO UNION STATUS

- CLOSED SHOP
- UNION SHOP
- MEMBERSHIP MAINTENANCE
- PREFERENTIAL HIRING
- RECOGNITION ONLY

[fol. 29-7] of membership provisions established by order of the National War Labor Board allow 15 days during which members may withdraw if they do not wish to remain members for the duration of the agreement.

Some agreements provide for preferential hiring without union-membership requirements. In other words, union members must be hired if available, but otherwise the employer may hire nonmembers and such persons need not join the union as a condition of continued employment.

Some agreements include no membership requirements as a condition of hiring or continued employment. The union is recognized as the sole bargaining agent for all employees in the bargaining unit and is thus responsible for negotiating the working conditions under which all workers are employed, including those who do not belong to the union. This type of agreement, unlike the others, does not enable the union to rely on employment per se to maintain or increase its membership.

Extent of various types of union-status provisions.—Although the proportion of workers under closed- and union-shop clauses remained about the same, the proportion under maintenance-of-membership clauses continued to increase during 1944. By January 1945, approximately 27 percent ($3\frac{3}{4}$ million) of all persons employed under union agreements were employed under maintenance-of-membership clauses, an increase during the year of almost 23 percent in the proportion of workers under such agreements. About 28 percent (4 million) of all workers under agreement were employed under closed-shop provisions and about 18 percent ($2\frac{1}{2}$ million) under union-shop agreements. (About 7 percent of the latter were covered by agreements which also specified that union members should be given preference in hiring.) Only 2 percent of all workers under agreement were covered by union preferential clauses, whereas 25 percent were under agreements which provided recognition only.

The proportion of workers under agreement covered by various types of union status in January 1945 is shown by chart 1, for major industry groups. All clerical, professional, and service workers are included in the group "other workers." All trucking and warehousing workers are included in "transportation, communication, and public utilities." Ex-

cept for these occupational groups, workers have been included in the industry in which they are employed.

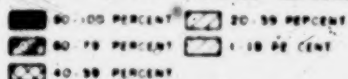
● *Manufacturing.*—In January 1945, closed-shop provisions covered approximately 23 percent of all workers under manufacturing agreements, and union-shop agreements 20 percent,—or together a total of about 3 $\frac{1}{4}$ million workers. Of the union-shop agreements, about 10 percent also provided that union members should be given preference in hiring. Most of the wage earners under agreement in the bakery, brewery, men's and women's clothing, and printing and publishing industries were employed under closed-or-union-shop clauses. Substantial proportions of those under agreement in the hosiery and canned and preserved foods industries, and a majority of those under agreement in the paper, shoe, shipbuilding, and silk and rayon industries, were working under closed- or union-shop provisions.

About 3 $\frac{1}{2}$ million workers in manufacturing industries were employed at the beginning of 1945 under maintenance-of-membership clauses. They included 40 percent of all workers under manufacturing agreements, representing an in-












































































PROPORTION OF WORKERS UNDER UNION AGREEMENT BY UNION STATUS IN SELECTED INDUSTRIES AND OCCUPATIONS JANUARY 1945

INDUSTRY -	CLOSED SHOP	UNION SHOP	MEMBERSHIP MAINTENANCE	PREFERENTIAL HIRING	RECOGNITION ONLY
AGRICULTURAL EQUIPMENT					
AIRCRAFT & PARTS					
ALUMINUM					
AUTOMOBILES & PARTS					
BAKING					
BREWERIES					
BUS & STREETCAR, LOCAL					
CANNED & PRESERVED FOODS					
CHEMICALS, EXCLUDING RAYON YARN					
CLERICAL & PROFESSIONAL OCCUPATIONS					
CLOTHING (MEN'S)					
CLOTHING (WOMEN'S)					
COAL MINING					
CONSTRUCTION					
COTTON TEXTILES					
ELECTRICAL MACHINERY & APPLIANCES					
GLASS & GLASSWARE					
HOSIERY					
LEATHER TANNING					
LIGHT & POWER					
MACHINERY & MACHINE TOOLS					
MARITIME & LONGSHORING					

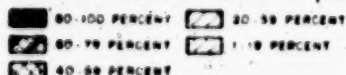
PROPORTION OF WORKERS UNDER AGREEMENT



PROPORTION OF WORKERS UNDER UNION AGREEMENT BY UNION STATUS IN SELECTED INDUSTRIES AND OCCUPATIONS JANUARY 1945

INDUSTRY	CLOSED SHOP	UNION SHOP	MEMBERSHIP MAINTENANCE	PREFER-ENTIAL HIRING	RECOGNITION ONLY
MEAT PACKING					
METAL MINING					
NONFERROUS ALLOYING, ROLLING & DRAWING					
NONFERROUS SMELTING & REFINING					
PAPER & ALLIED PRODUCTS					
PETROLEUM & COAL PRODUCTS					
POTTERY & CHINAWARE					
PRINTING & PUBLISHING					
RAILROADS					
RAILROAD EQUIPMENT					
RAYON YARN					
RUBBER PRODUCTS					
SERVICE OCCUPATIONS					
SHIPBUILDING					
SHOES, CUT STOCK & FINDINGS					
SILK & RAYON TEXTILES					
STEEL - BASIC					
STEEL PRODUCTS					
TELEPHONE					
TOBACCO PRODUCTS					
TRUCKING & WAREHOUSING					
WOOLEN & WORSTED TEXTILES					

PROPORTION OF WORKERS UNDER AGREEMENT



[fol. 29-10] crease of about 14 percent during the year in the proportion employed under such agreements. The greatest increase over the previous year in the proportion working under maintenance-of-membership clauses occurred in the nonferrous metals alloying, rolling and drawing industry (from less than 15 percent to over 50 percent), but there were very substantial increases in the machinery and machine-tool, nonferrous-metals smelting and refining, tobacco, woolen and worsted textile, and electrical-machinery industries. At the beginning of 1945 maintenance-of-membership clauses covered most of the employees under agreement in the basic steel industry, a substantial proportion of those in the agricultural and railroad equipment and meat-packing industries and a majority of those under agreement in the aluminum, automobile, electrical-machinery, machinery and machine-tool, rubber, tobacco, woolen and worsted textile industries and in the nonferrous-metals alloying, rolling, drawing, smelting and refining industries.

Only about 1 percent of all manufacturing workers under agreement were employed under preferential-hiring provisions with no union-membership requirements. In only one manufacturing industry, pottery, were such clauses common.

About 16 percent of the workers under agreement in all manufacturing industries were employed in plants which recognize the union as sole bargaining agent but do not require union membership as a condition of hiring or continued employment. In the rayon-yarn industry slightly more than half of those under agreement were covered by such clauses and between a third and a half of those in the cotton textile, petroleum and coal products, nonferrous-metals alloying, rolling, and drawing, aircraft, and glass industries.

Nonmanufacturing.—Approximately 36 percent of all workers under agreements in nonmanufacturing industries and occupations were covered by closed-shop provisions and about 16 percent by union shop provisions—a total of more than 23½ million workers. Only a few of the union-shop agreements also provided that union members should be given preference in hiring. The closed shop was provided in almost all agreements in building construction and trucking and in many of the agreements covering service and trade employees such as barbers and employees in building service, laundry, dry cleaning, and food establishments.

Coal miners and a majority of the organized bus and street-railway employees were under union-shop agreements.

About 6 percent of the nonmanufacturing workers under agreement were employed under membership-maintenance clauses. The greatest increase over the previous year in the proportion working under such clauses occurred in wholesale and retail trade, metal mining, and crude petroleum and natural gas; in the two last-named industries the majority of the employees were covered by such clauses.

Only 4 percent of all nonmanufacturing workers under agreement were employed under agreements with preferential-hiring provisions but no union-membership requirements. Only in maritime and longshoring are such clauses common.

About 38 percent of the workers under agreement in all nonmanufacturing industries and occupations were employed under contracts which recognized the union as sole bargaining agent but included no membership requirements. [fol. 29-11] More than half of these workers were employed in the railroad industry, where virtual union-shop conditions prevail, although the agreements do not provide for union-shop arrangements.

Check-Off Arrangements

During 1944 there was an increase of about 28 percent in the proportion of workers under agreements who were covered by some form of check-off provisions. Almost 6 million workers, or more than 40 percent of all employees under a regment, were covered by check-off provisions in January 1945. About half were covered by clauses providing for the automatic check-off of all members' dues and the other half by clauses which provide for check-off only for those employees who file individual written authorizations with the employer. Under some of the latter agreements the authorizations, once made, continue in effect for the duration of the agreement; under others they may be withdrawn whenever the employee desires. (If working under a closed- or union-shop or maintenance-of-membership agreement, however, the employee must personally pay his dues to the union if he cancels his check-off.) Although most of the check-off clauses provide that all dues and assessments levied by the union shall be collected, some

specify "regular dues only" or check-offs not to exceed a given amount.

Manufacturing. Almost 4½ million workers, or more than half of all workers under agreement in manufacturing industries, were employed at the beginning of the year under agreements which provide for check-off. Slightly fewer manufacturing workers were covered by automatic check-off arrangements than by provisions for check-off upon individual authorization.

During 1944 the proportion of workers under check off arrangements increased about 38 percent. Most of the increase in the proportion under agreement with check off arrangements took place in shipbuilding, although there were considerable increases in the railroad-equipment and nonferrous metals alloying, rolling, and drawing industries. Over 90 percent of the workers under agreement in the basic steel, railroad-equipment, and hosiery industries were covered by check off provisions, and the great majority of those in the cotton textile, meat packing, nonferrous-metals alloying, rolling, and drawing, shipbuilding, silk and rayon textile, and woolen and worsted textile industries.

Nonmanufacturing.—About 1½ million, or 26 percent of the workers employed under agreements in nonmanufacturing industries, were covered by some form of check-off arrangement. Most of these check-off clauses, including those covering coal miners, specify that the employer is to deduct the union dues and assessments from the wages of all members. The agreements for about a third of the non-manufacturing employees covered by check-off clauses provided for check-off only upon authorization of individual employees.

4 clerk's Certificate to foregoing paper omitted in printing.

[fol. 29-12] DEFENDANT'S EXHIBIT No. 2

U. S. Department of Labor, Bureau of Labor Statistics

For Release April 21, 1947

Extent of Collective Bargaining and Union Recognition, 1946¹

Union Agreement Coverage

Approximately 14.8 million workers were employed under conditions determined by written collective bargaining agreements in 1946, an increase of 1 million workers compared with 1945. The workers covered by agreement represent 48 percent of the 31 million² engaged in occupations in which the unions have been organizing and endeavoring to obtain written agreements. The percentage covered was the same as in the previous year, but fewer workers—approximately 29 million—were eligible for agreement coverage in 1945. Nonmanufacturing industries accounted for

¹ Prepared in the Bureau's Industrial Relations Branch, Boris Stern, Chief with Philomena Marquardt in immediate charge of assembling the information.

For similar data for previous years, see Monthly Labor Review, April 1946, April 1945, April 1944, February 1943, May 1942, and March 1939.

² This estimate of 31 million includes all wage and salary workers except those in executive, managerial, and some professional positions, but excludes all self-employed, domestic workers, agricultural wage workers on farms employing less than 6 persons, Federal and State government employees, teachers, and elected or appointed officials in local governments.

It should be noted that the number of workers covered by union agreements is not the same as union membership. Except under closed or union-shop conditions, agreements cover nonmembers as well as members employed within the given bargaining unit. On the other hand, some union members may be working in unorganized plants and many civil-service employees and teachers are members of unions but are not employed under the terms of bilateral written agreements.

much of the increase in employees eligible for agreement coverage.

About 7.9 million production workers in manufacturing were covered by union agreements in 1946 (69 percent of those employed) compared to 8 million (67 percent) a year earlier. In the nonmanufacturing industries 6.9 million workers, or 35 percent of the potentials were employed under union agreements. Part of the decrease in total coverage in the manufacturing industries can be accounted for by changes in employment in such industries as aircraft and shipbuilding, in which a large proportion of the workers are covered by union agreement. In the nonmanufacturing industries the increase in the number of workers can be accounted for by higher employment in such industries as construction, in which the proportion of workers covered by collective bargaining is very high.

The extent of union agreement coverage in the various manufacturing and nonmanufacturing industries is shown in Table 1.

[Tot. 29-13] Because each group covers a range of 20 percent, it is possible for the proportion of covered workers within an industry to increase several percent and still remain within the same group. During 1946 the percentage of workers covered by Agreements in the dairy products industry increased enough to bring it from the 1-19 percent into the 20-39 percent category. Chemicals, excluding rayon yarn and the paper products industries moved from the 20-39 percent into the 40-59 percent group. Canning and preserving foods, dyeing and finishing textiles, and leather gloves increased in the proportion covered so that they shifted from the 40-59 percent to the 60-79 percent column. Moving from the 60-79 percent into the 80-100 percent group, were the electrical machinery and the rayon yarn industries.

TABLE 1

Proportion of Wage Earners Under Union Agreements in 1946
Manufacturing Industries

80-100 percent	60-79 percent	40-59 percent	20-39 percent	1-19 percent
Agricultural equipment Aircraft and parts Aluminum Automobiles and parts Breweries Carpets and rugs, wool Cement Clocks and watches Clothing, men's Clothing, Women's Electrical machinery Furs and fur garments Glass and Glassware Leather tanning Meat packing Newspaper printing & publishing Nonferrous metals and products, except those listed Rayon yarn Rubber Shipbuilding Steel, basic Sugar	Book and job printing & publishing Coal products Canning and preserving foods Dyeing and finishing textiles Gloves, leather Machinery, except agricultural equipment and electrical machinery Millinery & hats Paper & pulp Petroleum refining Railroad equipment Steel products Tobacco Woolen and worsted textiles	Baking Chemicals, excluding rayon yarn Flour & other grain products Furniture Hosiery Jewelry & silverware Knit goods Leather, luggage, handbags, novelties Lumber Paper products Pottery, including chinaware Shoes, cut stock & findings Stone and clay products, except pottery	Beverages, nonalcoholic Confectionery products Cotton textiles Dairy products Silk and rayon textiles	None

Non-manufacturing

80-100 percent	60-79 percent	40-59 percent	20-39 percent	1-19 percent
Actors and musicians Airline pilots and mechanics Bus and streetcar, local Coal mining Construction Longshoring Maritime Metal mining Motion picture production Railroads Telegraph Trucking, local and intercity	Radio technicians Theater-stage hands, motion-picture operators	Bus lines, intercity Light and power Newspaper offices Telephone	Barber shops Building servicing and maintenance Cleaning and dyeing Crude petroleum and natural gas Fishing Hotels and restaurants Laundries Nonmetallic mining and quarrying Taxicabs	Agriculture ¹ Beauty shops Clerical and professional, excluding transportation, communication, theaters, and newspapers Retail and wholesale trade

¹ Less than 1 percent.

[fol. 29-15]. **Extent of Union Recognition By Types**

Approximately 4.8 million workers were covered by closed and union-shop with preferential hiring provisions in 1946, compared to 4.25 millions in 1945. Union shop clauses, without preference in hiring, were specified for almost 2.6 million workers in 1946 and 2 million in 1945. The number of workers covered by maintenance-of-membership decreased from more than 3.9 millions in 1945 to 3.6 million in 1946.

Table 2 indicates the changes in the proportion of workers under each type of union recognition from 1941 through 1946. During the war there was a major shift from sole bargaining and bargaining for members only to maintenance of membership. The 1946 figures indicate a trend away from the latter type, and to the union or closed shop.

Table 2 lists the industries in which at least half of the workers who are under agreement are covered by the type of union recognition specified.

A few industries (such as shipbuilding and iron and steel products) which were listed in the 1945 report do not appear this year because 50 per cent of the workers in those industries are no longer covered by any one type of recognition clause. Carpets and rugs and woolen and worsted were both listed under maintenance of membership in 1945 but in 1946 over half of the workers in those industries who were covered by union agreements were under union-shop provisions.

The most marked change has taken place in the automobile industry. In 1945 over half of the covered workers had maintenance-of-membership provisions in 1946 a little over 10 percent had such provisions, while a third were covered by union-shop requirements, a fourth by sole-bargaining arrangements, and another fourth by maintenance-of-union-dues requirements.

The proportion of workers under the different types of union security for a selected group of industries is shown in Table 5, while the approximate number of workers in each of the major census groups for manufacturing and the totals for non-manufacturing are given in Table 6.

TABLE 2

Changes in Union Recognition in the United States, 1941-1946

Item	1941	1942	1943	1944	1945	1946
Eligible for union-agreement coverage:						
Number (in millions)	31	31	31	30 25	29	31 2
Percentage under agreement	30	40	45	47	48	48
	Percentage Distribution					
Workers under agreements providing for—						
Closed shop	46	45	30	28	30	33
Union shop			20	18	15	17
Maintenance of Membership	2	15	20	27	29	25
Preferential Hiring	2	5	2	2	3	3
Other ³	2	35	28	25	23	22
Total		100	100	100	100	100

¹ Percentages not strictly comparable, year by year, because of slight changes in volume of employment during the period.

² No data.

³ No membership or hiring requirements are mentioned in these agreements, which have clauses specifying sole bargaining, maintenance of union dues, and bargaining for members only.

[fol. 29-16]

TABLE 3

Industries with 50 Percent or More of the Workers Under Agreement Covered by Specified Types of Clauses

Manufacturing Industries				
Closed or Union Shop with Preferential Hiring	Union Shop	Maintenance of Membership	Preferential Hiring	Sole Bargaining
Baking	Carpets & rugs, wool	Aircraft & parts	Pottery	Cement, Sugar, cane
Breweries	Flat glass	Cigarettes & tobacco		
Canning & preserving foods	Knit goods	Chemicals		
Clothing, men's	Paper and allied products	Cotton textiles		
Clothing, women's	Sugar, beet	Electrical machinery		
Dyeing & finishing textiles	Woolen & worsted textiles	Machinery except electrical		
Gloves, leather		Meat packing		
Glass containers		Non-ferrous metals		
Hosiery		Petroleum refining		
Printing & publishing		Rubber		
Shoes, cut stock and findings		Steel, basic		
Non-Manufacturing Industries				
Construction	Coal mining	Crude petroleum & natural gas	Longshoring	Railroads
Trucking & warehousing		Metal mining	Maritime	Telephone
		Public utilities, electric light & power, water & gas		
		Telegraph		

TABLE 4

Proportion of Workers Under Agreement Covered by Different Types of Union Security in 1946

	Total	Closed shop and union shop with preferential hiring	Union Shop	Maintenance of membership	Other
	%	%	%	%	%
Total	100	33	17	25	25
Manufacturing	100	28	19	38	15
Nonmanufacturing	100	38	16	9	37

[fol. 29-17] Types of Union Recognition

Definitions

Closed shop. Under this type of union recognition all employees must be members of the union at the time of hiring and they must remain members in good standing during their period of employment. The following is the simplest form of a closed shop provision:

The employer shall employ none but members in good standing in the union. All employees shall remain members in good standing as a condition of continued employment.

Hiring through the union, unless it is unable to supply the required number of workers within a given period, is required under most of the closed-shop agreements and those employees who are hired through other procedures must join the union before they start to work.

Union shop. Workers employed under a union shop agreement need not be union members when hired, but they must join the union within a specified time, usually 30 to 60 days, and remain members during the period of employment. A characteristic clause setting up a union shop generally reads:

All present employees not on the excluded list (outside the bargaining unit) who are not now members of the Union, must become members within 30 days after the signing of this Agreement. All persons employed, after this date, must become members of the Union within 30 days after date of their employment. All employees will remain members of the Union in good standing as defined by the Constitution and by-laws of

the Union as a condition of Employment or the duration of this Agreement.

Union shop with preferential hiring. When the union shop agreement specifies that union members shall be given preference in hiring or that the hiring shall be done through the union the effect is very much the same as the closed-shop agreement.

When the Company is in need of a new employee, the union shall have the first opportunity to supply such employees. If the Union shall be unable to supply such employees within one week, or if the Union waives the right to supply such employees, the Company may hire any person it desires.

Any new employees hired by the Company who are not already members of the Union, shall become members of the Union within two (2) weeks of the date of their employment. Only members in good standing of the Union shall continue in the employ of the Company.

[fol. 29-18] Modified union shop

In some cases the union shop is modified so that those who were employed before the union shop was established are not required to become union members. This type of union security is sometimes referred to as a modified shop.

(a) All employees hired after the date of execution of this agreement, must, after a six week probationary period, become and remain members of the Union in good standing as a condition of continued employment. In individual cases the Employer shall have the opportunity of negotiating with the Union with respect to a longer probationary period.

(b) It is agreed that present employees, who have not and do not desire to join the Union, need not do so as a condition to their continued employment with the Company. It is agreed that all employees who are members of the Union, or who may become members of the Union, shall remain members in good standing during the life of this agreement.

Maintenance of membership

This type of union security requires that all employees who are members of the union a specified time after the

agreement is signed and all who later join the union, must remain a member in good standing for the duration of the agreement. Following the pattern of the maintenance of membership clauses established by the National War Labor Board, most of the agreements with this type of union security clause provide for a 15-day period during which members may withdraw from the union if they do not wish to remain members during the life of the agreement.

It is agreed that all employees who, fifteen (15) days after the signing of this agreement, namely, (Date) are members of the Union in good standing in accordance with the Constitution and By-Laws of the Union and all employees who thereafter, become members of the Union, shall, as a condition of employment, continue to remain members in good standing as long as the Union specified above remains the collective bargaining agent. §

Members of the Union who are delinquent in dues payments shall pay all dues before they shall be permitted to avail themselves of the fifteen (15) day escape period provided for above.

Members of the Union in good standing for the purpose of this provision shall be all persons who are, members in good standing as of (Date) or who subsequently become members and have not resigned or withdrawn and so notified the Union in writing prior to (Date).

[fol: 29-19] Maintenance of Union dues

During 1946 a few agreements covering workers employed by large companies which had specified maintenance of membership in 1945 were modified, to provide sole bargaining with the check-off of union dues for all union members as a condition of employment. Clauses of this type (which specify this form of irrevocable check-off) are found in agreements negotiated with the General Motors Corporation, the Goodrich Tire and Rubber Company, Akron, the International Harvester Company, East Moline, Illinois, the Western Electric Company, and Yale & Towne. An example of this maintenance of union dues clause is as follows:

All employees who, fifteen days after the beginning of the first pay roll week following the date of this Agreement (Date), are members of the union in good stand-

ing in accordance with its constitution and by-laws, and all employees who become members after that date, shall, as a condition of employment authorize the Company for the duration of this Agreement to deduct from their pay and transmit to the Union an amount equivalent to their Union dues as currently established by the Union in accordance with its constitution and by-laws.

Preferential hiring

No union membership is required under this type of clause but union members must be hired if available. When the union cannot supply workers, the employer may hire non-members and they are not required to join the union as a condition of employment.

Members of the union shall have all of the work pertaining to the rigging up of ships and the coaling of same, and the discharging and loading of all cargoes including mail, ships' stores and baggage. When the union cannot furnish a sufficient number of men to perform the work in a satisfactory manner, then the employer may employ such other men as are available.

Other Types of Union Recognition

Sole bargaining

Under some agreements no requirement for union membership or for hiring through the union is specified. The union is the sole bargaining agent for all employees and negotiates the agreement covering all workers in the bargaining unit whether they are members of the union or not.

The Company recognized Union No. — as the exclusive bargaining agency for all production and maintenance employees of the company, exclusive of executive, administrative, office, clerical employees and employees within the jurisdiction of the — Union, and all supervisory employees with the authority to hire, discharge, discipline or effectively recommend changes in the status of employees as to factory wage rates, hours and working conditions.

Members only

A few agreements stipulate that the union shall act as bargaining agent for its members only, and the agreement does not cover other workers.

The Employer recognizes the — Union as the collective bargaining agency for its production and maintenance employees who are members of the Union, at the Employer's — works and mine.

[fol. 29-20]

TABLE 5

Proportion of Workers Under Union Agreement by Union Security in Selected Industries and Occupations, 1946

Industry	Total	Closed or Union Shop With Pref. Hiring	Union Shop—No Pref. Hiring	Main- tenance of Mem- bership	Pref. Hiring	Other
	%	%	%	%	%	%
Manufacturing						
Agricultural machinery	100	1	4	74		21
Aircraft and parts	100	6	8	62		24
Aluminum	100	5	14	79		2
Automobiles and parts	100	1	35	12		52
Canning & preserving foods	100	64	11	19		6
Chemicals, excluding rayon yarn	100	3	34	52		11
Cigarettes & tobacco	100	1	35	54		10
Cigars	100	43	12	43		2
Clothing, men's	100	90	6		4	
Clothing, women's	100	97	3			
Cotton textiles	100	32	8	52		8
Dyeing & finishing textiles	100	56	20	22	1	1
Electrical machinery	100	9	15	57	1	18
Furniture & finished lumber products	100	20	29	37	1	13
Hosiery	100	59	12	25		4
Leather tanning	100	18	23	36		23
Meat packing	100	11	12	75		2
Paper	100	7	53	39		1
Petroleum refining	100	1	7	57		35
Rayon yarn	100	1	3	69		27
Rubber	100	2	15	66		17
Shipbuilding	100	32	11	48		9
Shoes	100	50	5	42		3
Silk & rayon textiles	100	37	26	23		14
Steel, basic	100		3	93		4
Steel products	100	11	33	47	1	8
Woolen & worsted textiles	100	2	66	18		14
Non-Manufacturing						
Coal mining	100		100			
Construction	100	94			6	
Railroads	100					100
Telephone	100	3	1	28		68

TABLE 6

Approximate Number of Workers Covered in 1946
by the Type of Union Security Listed.
Manufacturing

Industry	Closed Shop	Union Shop with Preferential Hiring	Union Shop	Membership Maintenance
Food	210,000	130,000	90,000	185,000
Tobacco	8,000	3,000	15,000	32,000
Textile	40,000	120,000	165,000	180,000
Apparel	515,000	320,000	50,000	8,000
Lumber	25,000	90,000	60,000	76,000
Furniture	20,000	20,000	55,000	70,000
Paper		15,000	126,000	70,000
Printing & Publishing	250,000			
Chemicals	1,000	4,000	60,000	125,000
Petroleum		5,000	15,000	50,000
Rubber		3,000	30,000	140,000
Leather	40,000	61,000	20,000	60,000
Stone, Clay & Glass	5,000	45,000	75,000	35,000
Iron & Steel	30,000	40,000	235,000	725,000
Non-Ferrous Metals	30,000	15,000	40,000	185,000
Electrical Machinery	15,000	25,000	70,000	260,000
Machinery, excluding electrical	15,000	15,000	90,000	460,000
Automobile	1,000	10,000	240,000	80,000
Transportation Equipment	55,000	17,000	50,000	250,000
Miscellaneous	15,000	12,000	20,000	40,000
Totals	1,275,000	950,000	1,506,000	3,031,000

Non-Manufacturing

Total All Groups	2,082,000	547,000	1,091,000	664,000
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¹ Included in this group are employees in construction, trucking, warehousing, services, clerical, sales and professional occupations, mining, transportation, communications and public utilities.

[fol. 29-22] Check-Off Arrangements

Approximately 6 million workers (41 percent of all under union agreements) were covered by some form of check-off provisions in 1946. This is an increase of close to three-quarters of a million from the 1945 total. Automatic deduction of dues was specified for a little over half of these workers while the others specified check-off of union dues only for employees who give the employer an individual written authorization. Some of these may be withdrawn at any time; others remain in effect for the life of the agreement.

In the manufacturing industries 4.7 million workers (61 percent) had their dues checked off compared to the 4 million (about 50 percent) in 1945. The number of nonmanufacturing workers covered by check-off arrangements remained at

about 1.3 million for 1946, but this was not quite 20 percent of the workers under agreement; in 1945 with only 13.8 million under agreement the same number of workers covered brought the proportion to 24 percent.

Changes in check-off arrangements from 1942 through 1946 are given in Table 7 and they show a gradual increase in the number of workers covered by such provisions. Table 8 lists the industries which have at least half of the workers under agreement covered by one type of check-off. A few industries listed for 1945, such as chemicals, steel products, and men's clothing, no longer have 50 percent of the covered workers under a single type of check-off.

The proportion of workers under agreement by type of check-off for selected industries is given in Table 9, while the approximate number of workers covered by check-off in 1946 for the major manufacturing industries as for non-manufacturing is shown in Table 10.

Below are definitions of the two types of check-off and examples of union agreement clauses providing for each. Table 11 shows the proportion of workers under agreement by each type of check-off during 1946 for manufacturing and non-manufacturing industries.

[fol. 29-23]

TABLE 7

Changes in Check-Off Arrangements in the United States, 1941-1946

Number Under Agreement (in millions).	1941 10.3	1942 12.5	1943 13.8	1944 14.3	1945 13.8	1946 14.8
	Percentage Distribution ¹					
Workers under agreements providing for—						
Automatic Check-Off	²	12	18	21	23	24
Voluntary Check-Off	²	8	14	20	16	17
No Check-Off	²	80	68	59	61	59
Total		100	100	100	100	100

¹ Percentages not strictly comparable, year by year, because of slight changes in volume of employment during the period.

² No data.

TABLE 8

Industries With 50 Percent or More of Workers Under Agreement Covered
by Specified Type of Check-Off

Voluntary	Automatic
Cement	Aircraft engines
Clocks and watches	Aluminum
Glass, flat	Automobiles
Petroleum & coal products	Carpets & rugs (wool)
Sugar, cane	Cigarettes & tobacco
Textiles, except carpets & rugs (woolen) and hosiery	Electrical machinery
	Hosiery
	Leather, except gloves and shoes
	Meat packing & slaughtering
	Non-ferrous smelting & refining
	Rubber tires & tubes
	Steel, basic
	Sugar, beet
	Non-Manufacturing
Crude petroleum and natural gas products	Coal mining
Telephone	Iron mining
	Telegraph

[fol. 29-24]

TABLE 9

Proportion of Workers Under Union Agreement by Type of Check-off
in Selected Industries, 1946

Industries	Manufacturing	Total	Voluntary Check-off	Automatic Check-off	No. Check-off
	%	%	%	%	%
Agricultural Machinery	100	13	41	46	
Aircraft & Parts	100	35	47	18	
Aluminum	100	15	80	5	
Automobiles & Parts	100	6	59	35	
Canning & Preserving Foods	100	26	11	63	
Chemicals, excluding rayon yarn	100	46	22	32	
Cigarettes & tobacco	100	1	84	15	
Cigars	100	23	36	41	
Clothing, men's	100	25	43	32	
Clothing, women's	100	3	6	91	
Cotton textiles	100	77	21	2	
Dyeing & finishing textiles	100	67	20	13	
Electrical machinery	100	19	65	16	
Furniture & Finished Lumber Products	100	32	28	40	
Hosiery	100	30	63	7	
Leather Tanning	100	49	20	31	
Meat Packing	100	8	76	16	
Paper	100	33	14	53	
Petroleum Refining	100	46	20	34	
Rayon yarn	100	36	45	19	
Rubber	100	32	44	24	
Shipbuilding	100	17	43	40	
Shoes	100	33	23	44	
Steel, basic	100	2	94	4	
Steel Products	100	21	43	36	
Woolen & Worsted Textiles	100	68	20	12	
Non-Manufacturing					
Coal mining	100		100		
Construction	100				100
Railroads	100				100
Telephone	100	66			34
Silk, Rayon textiles	100	83	14		3

[fol. 29-25]

TABLE 10

Approximate Number of Workers Covered in 1946 by
Type of Check-Off Specified

Industries	Manufacturing (in thousands)	
	Automatic	Voluntary
Food	160	84
Tobacco	43	6
Textiles	158	349
Apparel	240	133
Lumber	5	49
Furniture	53	60
Paper	33	63
Printing & Publishing		
Chemicals	61	97
Petroleum	19	53
Rubber	92	66
Leather	60	59
Stone, Clay & Glass	43	88
Iron & Steel	702	147
Non-ferrous metals	142	91
Electrical machinery	297	87
Machinery excluding electrical	251	177
Automobiles	415	41
Transportation equipment	219	103
Miscellaneous	39	24
	3,032	1,777
Non-Manufacturing		
Total all groups ¹	605	726
Totals	3,637	2,503

¹ Included in this group are employees in construction, trucking, warehousing, services, clerical, sales and professional occupations, mining, transportation, communications and public utilities.

[fol. 29-26]

Check-Off Arrangements

Definitions:

Automatic check-off. Many agreements specify that the employer shall deduct the union dues from the pay of all union members. In addition they may specify that initiation fees, and assessments shall be checked-off.

The Company will deduct from the pay of each employee covered by this agreement all union initiation fees, dues and assessments.

Voluntary check-off. A number of agreements specify that the employer shall check-off union dues or assessments only for those employees who sign individual authorization.

In most cases the employee may withdraw his authorization whenever he wishes.

The Company agrees that any member of Local — may, upon written instructions to the Company with a copy of Local —, request the Company to deduct his Union dues from his pay check once each month and the Company agrees that such collected dues will be turned over monthly to the Financial Secretary of Local — with full accounting thereof. It is understood that any Union member may rescind such deduction instructions at any time provided the Company is given written thirty days notice with a copy to Local — on a form provided for that purpose. Unless rescinded, authorization for deduction of all dues shall continue for the duration of this agreement.

[fol. 29-26]

TABLE 11

Proportion of Workers Under Agreement by Types of Check-Off in 1946

	Total	Automatic check-off	Voluntary check-off	No check-off
	%	%	%	%
Total	100	24	17	59
Manufacturing	100	38	23	39
Non-Manufacturing	100	9	10	81

[fol. 29-27] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 29-28] Evidence Closed.

DEMURRER AND RENEWAL OF MOTION FOR JUDGMENT OF NONSUIT

Defendants demur to the evidence and renew their motion for judgment as of nonsuit. Motion denied. Defendants except.

Exception No. 3

IN SUPERIOR COURT OF BUNCOMBE COUNTY

ASSIGNMENTS OF ERROR

The defendants, each and all of them, having excepted to the rulings and Judgment of the Court in this action, assign as error:

[fol. 30] Assignment #1: The Court erred in overruling the defendants' Motion to Quash the Warrant, as set out in Exception #1 (R. p. 5).

Assignment #2: The Court erred in denying defendants' demurrer and in overruling defendants' motion for judgment as of nonsuit at the close of the State's evidence, as set out in Exception #2 (R. p. 14).

Assignment #3: The Court erred in denying defendants' demurrer and in overruling their motion for judgment as of nonsuit at the close of all the evidence, as set out in Exception #3 (R. p. 29).

Assignment #4: The Court erred in overruling defendants' motion to set aside the verdict, as set out in Exception #4 (R. p. 6).

Assignment #5: The Court error in overruling defendants' motion for an arrest of judgment as set out in Exception #5 (R. p. 7).

Assignment #6: The Court erred in signing the judgment, as set out in Exception #6 (R. p. 8).

IN SUPERIOR COURT OF BUNCOMBE COUNTY

STIPULATION AS TO CASE ON APPEAL

In apt time it is stipulated and agreed by and between William K. McLean, Solicitor in and for the 19th Judicial District of North Carolina, and George Pennell, Attorney

of record for the defendants George Whitaker, A. M. DeBruhl, T. G. Embler, H. E. Setzer, J. E. Rogers, Fred Black, and R. B. Robertson, that the foregoing is a proper statement of the case on appeal and shall constitute the case on appeal by the defendants to the Supreme Court, which, together with the record proper and assignments or error, hereinbefore set forth, shall constitute the Case on Appeal to the Supreme Court.

[fol. 31] This the 3rd day of August, 1947.

W. K. McLean, Solicitor of the 19th Judicial District.

Geo. Pennell, Attorney for Defendants,

(Transcript Certified by Clerk Superior Court.)

[fol. 32] IN THE SUPREME COURT OF NORTH CAROLINA, FALL TERM, 1947

No. 78

STATE

v.

GEORGE WHITAKER, M. DEBRUHL, T. G. EMBLER, H. E. SETZER, J. E. ROGERS, FRED BLACK and R. B. ROBERTSON

Defendants' appeal from Nettles, J., July Term, 1947, Buncombe Superior Court.

OPINION—Filed December 19, 1947

This is a criminal action in which the defendants were charged with a violation of Sections 2, 3, and 5 of Chapter 328 of the Sessions Laws of 1947. For convenience of reference the statute is reproduced here in full.

"An Act to protect the right to work and to declare the public policy of North Carolina with respect to membership or non-membership in labor organizations as affecting the right to work: to make unlawful and to prohibit contracts or combinations which require membership in labor unions, organizations or associations as a condition of employment: to provide that membership in or payment of money to any labor organization or Association shall not be necessary for employment or for continuation of employment and to authorize suits for damages.

The General Assembly of North Carolina do enact:

Section 1. The right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraints and coercion. It is hereby declared to be the public policy of North Carolina that the right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization or association.

Sec. 2. Any agreement or combination between any employer and any labor union or labor organization whereby persons not members of such union or organization shall be denied the right to work for said employer or whereby such membership is made a condition of employment or continuation of employment by such employer, or whereby any such union or organization acquires an employment monopoly in any enterprise, is hereby declared to be against the public policy and an illegal combination or conspiracy in restraint of trade or commerce in the State of North Carolina.

Sec. 3. No person shall be required by an employer to become or remain a member of any labor union or labor organization as a condition of employment or continuation of employment by such employer.

Sec. 4. No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment.

Sec. 5. No employer shall require any person, as a condition of employment or continuation of employment to pay any dues, fees, or other charges of any kind to any labor union or labor organization.

Sec. 6. Any person who may be denied employment or be deprived of continuation of his employment in violation of Sections 3, 4 and 5, or of one or more of such Sections, shall be entitled to recover from such employer and from any other person, firm, corporation, or association acting in concert with him by appropriate action in the courts of this State such damages as he may have sustained by reason of such denial or deprivation of employment.

[fol. 33] Sec. 7. The provisions of this Act shall not apply to any lawful contract in force on the effective date hereof but they shall apply in all respects to con-

tracts entered into thereafter and to any renewal or extension of any existing contract.

Sec. 8. If any clause, sentence, paragraph or part of this Act or the application thereof to any person or circumstance, shall, for any reason, be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this Act, and the application thereof to other person or circumstances, but shall be confined to the part thereof directly involved in the controversy in which such judgment shall have been rendered and to the person or circumstance involved.

Sec. 9. All laws and clauses of laws in conflict with this Act are hereby repealed.

Sec. 10. This Act shall be in full force and effect from and after its ratification.

Chapter 75 of the General Statutes makes combinations, conspiracies and contracts in restraint of trade illegal and punishable as misdemeanors.

The defendant, George Whitaker, was a building contractor of the City of Asheville. The defendant, A. M. DeBruhl, was an officer and agent of the Asheville Building and Construction Trades Council of that City. The other defendants were officers and agents of local trade unions or organizations affiliated with the American Federation of Labor, as was set out in the warrant. The defendants were convicted in the Police Court of the City of Asheville, in which the case had been duly instituted and tried, and from the judgment and sentence in this case defendants gave notice of appeal to the Superior Court, where the case was tried *de novo*. When the case was called for trial in the Superior Court, the Solicitor announced that he would try the defendants on the original warrant issued in the Police Court.

The warrant charged the defendants, George Whitaker, an employer, and A. M. DeBruhl, an officer and agent of the Asheville Building and Construction Trades Council, T. G. Embler and the other defendants as officers and agents of local trade unions and organizations "did unlawfully and willfully enter into an illegal combination or conspiracy in restraint of the right to work and of trade or commerce in

the State of North Carolina and against the public policy of the State of North Carolina, by executing a written [fol. 34] agreement or contract by and between said employer and said Labor Unions and Organizations or combinations, whereby persons not members of said unions or organizations are denied the right to work for said employer, or whereby membership is made a condition of employment or continuation of said employment by said employer and whereby said named unions acquired an employment monopoly in any and all enterprises which may be undertaken by said employer are required to become or remain a member of a labor union or labor organization as a condition of employment or continuation of employment by said employer whereby said unions acquire an employment monopoly in any and all enterprises entered into by said employer in violation of House Bill #229, Session 1947, General Assembly of North Carolina, Chapter 328, 1947 Session Laws of North Carolina, and particularly sections 2, 3 and 5 thereof, and Chapter 75 of the General Statutes of North Carolina.

In the Superior Court the defendants made a motion to quash the warrant on the alleged grounds that the warrant did not charge a criminal offense and that Chapter 328 of the Session Laws of 1947 was enacted in violation of Article I, Section 17, of the Constitution of North Carolina and in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Federal Constitution; and it was further alleged that the Act was in violation of freedom of speech in assembly guaranteed by the First Amendment to the Federal Constitution and protection from State invasion by the Fourteenth Amendment.

The defendants also alleged the Act was in conflict with the Labor Management Act of 1947 and Article VI, clause 2, of the Federal Constitution, but this argument was not pressed on appeal to this Court.

The motion to quash was overruled, to which the defendants accepted.

All of the defendants were convicted by the jury on the offenses charged in the warrant. The defendants thereupon made a motion for an arrest of judgment, assigning as grounds therefor the same reasons set out in the motion to quash.

[fol. 35] This motion was overruled and sentence was imposed by the Court that each of the defendants pay a

fine of \$50.00 and also pay one-seventh of the costs. From this judgment and sentence the defendants appealed to this Court.

The charge of the Court to the jury was not sent up with the record and it is, therefore, to be taken that the Judge fully complied with the statute, G. S. 1-180, and stated in a plain and correct manner the evidence given in the case and declared and explained the law arising thereon.

In the brief of the defendants filed in this case, it is conceded that if the statutes alleged to have been violated are valid, the warrant properly charges the offenses alleged, and that there was adequate evidence of the violation of the statute. The defendants in their brief abandoned their assignments of error Nos. 1, 2 and 3, except as to their contention that a violation of Section 3 of the 1947 Act did not constitute a criminal offense.

From the State's evidence it appeared that the defendant, George Whitaker, was a local building contractor engaged in local construction work and had been such for many years. The defendant, A. M. DeBruhl, was an officer and agent of the Asheville Building and Construction Trades Council. The defendant, T. G. Embler, was an officer and agent of the International Brotherhood of Electric Workers, Local Union No. 238; H. E. Setzer, an officer and agent of the United Brotherhood of Carpenters and Joiners of America, Local Union No. 384; J. E. Rogers, an officer and Agent of the Brotherhood of Painters, Paper Hangers, and Decorators of America, Local Union No. 839; Fred Black, an officer and agent of the Bricklayers, Masons and Plasterers International Union of America, Local Union No. 1; and R. B. Robertson, an officer and agent of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Asheville Local Union No. 487.

These labor unions or organizations are all affiliated with the American Federation of Labor, with a total membership of approximately 1,260.

[fol. 36] These defendants, by their own admission, had entered into a written contract dated the 25th of May, 1947, which was offered in evidence. This contract provided that the employer agreed to recognize the labor unions of Asheville and vicinity as the spokesmen for the workmen in the industry and the representatives of their respective trades taken collectively. It was agreed that the employer would

employ none but the union members, affiliated with the Building and Construction Trades Council composed of the various unions mentioned. The use of members in good standing of the labor unions by the employer was to include skilled, semi-skilled and unskilled labor on all work thereafter to be done, directly or indirectly, by the employer.

In Section 4 of the contract, the employer agreed to abide by all rules and regulations of the respective trades affiliated with the Building and Construction Trades Council, and comply with the rates of wages and specified hours recognized by the respective trades. Sub-contractors, if employed, would be likewise bound.

The contract in Section 6 recognized the right of the employer to discharge an employee for incompetency, intoxication or other just causes. Provision was made for arbitration in cases of disputes or differences. The agreement was to be in effect from the 25th of May, 1947, until the 25th of May, 1949, and to continue from year to year unless either party expresses a desire for a change ninety days prior to any annual termination date.

Evidence for the State was not contradicted by any of the defendants. Defendants, however, offered as witnesses certain officers of the State Federation of Labor who, without objection on the part of the State, made statements in the form of arguments, presenting their views as to union security agreements upon the economic welfare of employers and employees and the people of the State generally.

The defendant, George Whitaker, testified in the case and gave his reasons for his willingness to enter into the closed shop contract with the labor unions, which is set out in the record. He did not deny that he had entered into the contract.

[fol. 37] The jury returned their verdict:

"That the defendants are guilty of violating the provisions of House Bill #229, 1947 Session of the General Assembly of N. C., Chapter 328, 1947 Session Laws of North Carolina, and Chapter 75 of the General Statutes of North Carolina, as charged in the warrant."

On the coming in of the verdict the defendants moved to set it aside for errors committed on the trial. The motion

was overruled and defendants excepted. Judgment was entered on the verdict that defendants pay a fine each of \$50.00 and each pay one-seventh of the costs.

The defendants moved for an arrest of judgment for the grounds above alleged, and the motion was overruled. Defendants excepted.

To the judgment rendered defendants objected, and excepted; and appealed, assigning errors.

Harry McMullan, Attorney General; T. W. Bruton, Hughes J. Rhodes, Ralph Moody, Asst. Attys. General—for the State; George Pennell, Padway, Woll, Thatcher, Kaiser, Glenn & Wilson, By: Herbert S. Thatcher—for Defendants, Appellants.

SEAWELL, J.

The question whether violation of Section 3, 4 and 5 of the challenged statute constitutes a criminal offence was raised in *State v. Bishop*, *post*, and affirmatively answered. To this we refer.

Insofar as the same question is raised in this case, it may be, on the same reasoning similarly answered.

We note that appellants' brief abandons assignments of error No. 1 (R. pp. 4 & 30) and No. 2 (R. pp. 14 & 30) relating to the sufficiency of the warrant to state the charge and the sufficiency of the evidence to convict, if the statute is declaratory of a criminal offence, except that they insist on the motion to quash the warrant and arrest the judgment for that cause. We have referred to the contention, *supra*. The defence stresses the contention that Chapter 328 is in contravention of both the State and Federal Constitutions, and, therefore, void.

[fol. 38] While the basic laws under which the validity of the challenged legislation must be determined are elementary, they are, nevertheless, so fundamental as to bear summarization at this point. The Tenth Amendment to the Constitution of the United States provides, "The powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved for the States respectively or to the people." Within this reservation of powers to the individual states, is what has been judicially termed

"the police power." Chapter 328 of the General Session Laws of 1947 was enacted in attempted exercise of that power. The authority of the legislature to pass this statute, or any other measure it may deem necessary in the public welfare, is unlimited except where prohibited by the Federal or State Constitution or in conflict with Federal law enacted pursuant to constitutionally granted authority. The enactment in question has been challenged as prohibited by the Fourteenth Amendment to the Federal Constitution and Article I, Section 17, of the State Constitution.

Neither the Fourteenth Amendment nor Article I, Section 17, contains any unqualified prohibition. Both operate to prevent the legislature from depriving anyone of individual or property rights except by due process of law. Due process is, of necessity, an elastic term which through the years has been expanded to cope with the varying problems of our increasingly complex society.

The flexible restraints which the Fourteenth Amendment has placed upon the use of its police power by a state are carefully set forth by Mr. Justice Roberts in *Nebbia v. New York*, 291 US 502, at pages 523 and 525:

"Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights or contract rights are absolute; for government cannot exist if the citizen may at will use [fol. 39] his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest.

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The Fifth Amendment, in the field of Federal activity, and the Fourteenth as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaran-

¹ "What are the police powers of the state? They are nothing more or less than the powers of Government inherent in every sovereignty to the extent of its dominion." Judge Taney, *License cases*, 5 How. 504, 583.

tee of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."

The elasticity of these restrictions upon the use of the police power is the life-giving elasticity of the Constitution itself so vital to our economic, social and political growth. Perhaps more than that of any other social force, the progress of labor toward its rightful place in our society would have been retarded if all statutes enacted in the exercise of the police power had been measured on the Procrustean bed of judicial precedent.² The dictates of the Fourteenth Amendment, that "the means selected shall have a real and substantial relation to the object sought to be obtained, must be viewed in the light of contemporary conditions under which the legislature has seen fit to enact the statute in question. However, it is obvious that a clear understanding of those conditions is impossible without some resort to the historical development of the governmentally imposed rules for the struggle between the employer and the employed.³

² For instance, the Supreme Court of the United States has sustained, as valid exercise of this power, the statutes providing for maximum hours (*Bunting v. Oregon* 243 US 426), workmen's compensation (*New York Central Railroad Co. v. White*, 243 US 188), prohibiting intimidation of employees (*People v. Washburn*, 285 Mich. 119; appeal denied, 305 US 577) and prohibiting racial discrimination (*Railway Mail Association v. Corsi*, 326 US 88).

³ "Whether a law enacted in the exercise of the police power is justly subject to the charge of being unreasonable or arbitrary, can ordinarily be determined only by a consideration of the contemporary conditions, social, industrial and political, of the community to be affected thereby. Resort to such facts is necessary, among other things, in order to appreciate the evils sought to be remedied and the possible effects of the remedy proposed. Nearly all legislation involves a weighing of public needs as against private desires; and likewise a weighing of relative social values. Since government is not an exact science, prevailing public

[fol.40] Until recently, the struggle between management and labor has been demonstrably one-sided with Anglo-American law favoring the side possessing "the heaviest artillery." Since the first attempts within this country to define the legal weapons and areas of combat were based upon English precedent, a brief look in that direction may be helpful.

In England, any combination of laborers to raise wages or shorten hours was a crime until 1824.⁴ Until 1871, it was also a crime to threaten a strike or even to persuade an employee to leave his work;⁵ in 1875, Parliament enacted legislation providing that workmen would not be subject to indictment for criminal conspiracy in effecting collectively that which was lawful for one workman to do;⁶ while the closed shop was recognized as legal in 1898 by the House of

opinion concerning the evils and the remedy is among the important facts deserving consideration; particularly, when the public conviction is both deep-seated and widespread and has been reached after deliberation. What, at any particular time, is the paramount public need is, necessarily largely a matter of judgment. Hence, in passing upon the validity of a law-challenged as being unreasonable, aid may be derived from the experience of other countries and of the several States of our Union in which the common law and its conceptions of liberty and of property prevail. The history of the rules governing contests between employer and employed in the several English-speaking countries illustrates both the susceptibility of such rules to change and the variety of contemporary opinion as to what rules will best serve the public interest. The divergence of opinion in this difficult field of governmental action should admonish us not to declare a rule arbitrary and unreasonable merely because we are convinced that it is fraught with danger to the public weal, and thus to close the door to experiment within the law." Justice Brandeis, dissenting opinion, *Truax v. Corrigan*, 247 US 312, 356.

⁴ 5 Geo. 4, C. 95.

⁵ Criminal Law Amendment Act (1871) 34 and 35 Vic. C. 32.

⁶ The Conspiracy and Protection of Property Act (1875) 38 and 39 Vic. C. 86 Section 3.

Lords, acting as England's highest court,⁷ that body was unwilling to declare the boycott a legal weapon of labor although it had previously held it to be a permissible economic weapon when used by a combination of shipping firms;⁸ the boycott and peaceful picketing were legalized in 1906 by the Trade Disputes Act;⁹ following the general [fol. 41] strikes of 1926, Great Britain prohibited local and public authorities to enter closed shop agreements;¹⁰ that restriction was lifted in 1946.¹¹

Meanwhile, in this country early labor cases followed the English courts' interpretation of the common law. The Philadelphia Cordwainers' case is generally regarded as the first labor case in America; in 1806 a combination of journeymen shoemakers to effect a higher pay schedule was held illegal under the common law doctrine of criminal conspiracy.¹² This typified the early treatment of such matters. The courts made the initial inroads in the common law rules governing the employer-employee relationship, but the multiplicity of forums made for a variety of laws among the several states. The right of workingmen to form unions and strike for legitimate ends was recognized in 1842,¹³ but the judicial views on what constituted legitimate ends differed greatly.¹⁴ Many states held the closed shop illegal even in the absence of prohibitive statutes; while many others regarded it as justifiable and legal.¹⁵ It is

⁷ *Allen v. Flood*, A.C. 1, 1898.

⁸ Compare *Mogul Steamship Co. v. McGregor* (1892) A.C. 25 and *Quinn v. Leathem* (1901) A.C. 495.

⁹ 6 Edw. 7, C. 47 Section 2.

¹⁰ Trade Disputes Act of 1927.

¹¹ Trade Disputes & Trade Unions Act, 1946, 9 & 10 Geo 6, C. 52.

¹² *Commonwealth v. Pullis* (1806) Documentary history of American Industrial Society, Vol. 3, p. 59.

¹³ *Commonwealth v. Hunt*, 45 Mass. 111, Cited in *S. v. Van Pelt*, 136 N. C. 633.

¹⁴ For instance, in some jurisdictions the strike was held an illegal means of procuring a unionized shop; (*Plant v. Woods*, 176 Mass. 492) while in others it was held legal (*State v. Van Pelt*, supra.)

¹⁵ Teller, *Labor Disputes & Collective Bargaining*, Vol. 2, Sec. 424 et seq.

not here necessary to multiply illustrations or attempt to catalogue judicial pronouncements on labor matters. It is, however, significant to note that Justice Brandeis in dissenting this heterogeneous growth of labor relations law in his dissenting opinion in *Truax v. Corrigan*,¹⁶ first spoke of ".... the absence of legislation, to determine what the public welfare demanded . . ." and then stated "Judges, being thus called upon to exercise a quasi-legislative function and weigh relative social values, naturally differed in their conclusions on such questions."

[fol. 42] Ultimately, state legislatures did attempt "to determine what the public welfare demanded" by enacting laws defining the area of permissible conflict open to industrial combatants. Their general authority to do so has been firmly established.¹⁷ In the realm of labor contracts, the Supreme Court of the United States has sustained, as valid exercise of state police power, legislation providing for maximum hours,¹⁸ worker's compensation,¹⁹ forbidding payment of seaman's wages in advance,²⁰ prohibiting intimidat-

¹⁶ *Supra*, page 3.

¹⁷ "The right of the state to determine whether the common interest is best served by imposing some restrictions upon the use of weapons for inflicting economic injury in the struggle of conflicting industrial forces has not previously been doubted." *Carpenters' Union v. Ritter's Cafe*, 315 US 722, @ 725.

"That the State has power to regulate labor unions with a view to protecting the public interest is, as the Texas court said, hardly to be doubted." *Thomas v. Collins*, 323 US 516, @ 532.

"It is true that the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of society in which they exist. This is but an instance of the power of the State to set the limits of permissible contests open to industrial combatants." *Thornhill v. Alabama*, 310 US 88, pp. 103 & 104.

¹⁸ *Bunting v. Oregon*, *supra*.

¹⁹ *New York Central Railroad Co. v. White*, *supra*.

²⁰ *Patterson v. The Bark Eudora*, 190 US 169.

tion of employees,²¹ and prohibiting racial discrimination.²² In commenting on the latter decision, Professor E. Merrick Dodd stated, "Whatever might have been thought to be the law in the days when liberty of contract was treated by the Supreme Court as an almost absolute constitutional privilege, the decision in the *Corsi* case was to be expected. It is a natural consequence both of the increase in the economic power of unions and of the Supreme Court's increasing recognition, in recent years, that to refuse to treat the economic power of particular private groups as a constitutional justification for their regulation is in effect to substitute private government for government of, by and for the people. Now that employers have lost what were [fol. 43] formerly regarded as their constitutional rights of discriminating against union members and of paying less than legislatively-determined minimum wages, now that statutory bargaining rights granted to unions have been found to create implied duties not to discriminate against racial or religious groups, a union's claim that anti-discrimination laws infringe its constitutional liberties is a palpable anachronism. Moreover, what is true of labor unions, economic institutions which even when they have no closed shop agreements, tend to obtain a large measure of job control, is presumably true a fortiori of employers, who are the creators of jobs."²³

The most comprehensive gains made by labor have unquestionably been made in the field of Federal legislation. It is neither possible nor necessary for us to do more than highlight those gains in this opinion. *The Clayton Act* in 1914 restricted the use of the injunction in labor disputes in an effort to correct an almost universally recognized abuse of that judicial process.²⁴ This marked the first major step taken by Congress in enacting rules beneficial to labor in its conflict with management. However, it fell far short of its purpose and the Norris-LaGuardia Act in 1932 further and more specifically restricted the use of the injunction in addition to prohibiting "yellow dog contracts" and limiting

²¹ *People v. Washburn, supra.*

²² *Railway Mail Association v. Corsi, supra.*

²³ 58 HLR 1018 (at 1061).

²⁴ *The Clayton Act*, Oct. 15, 1914, C. 323, Sec. 20, 38 Stat. 730, 738.

the liability of union officials.²⁵ In 1935 Congress enacted the National Labor Relations Act²⁶ declaring the public policy of the United States to be the encouragement of collective bargaining and the protection of "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." To safeguard those rights the Act prohibited five specified [fol. 44] types of unfair employer practices. It further provided for the settlement of questions as to who are to represent employees, and it specifically preserved the right to strike. Among other provisions of the Act was the authorization of closed shop agreements with the specific limitation that nothing contained in the Act would permit such agreements in states under whose laws they were illegal.

Perhaps it might be said with the passage of The National Labor Relations Act, "the labor movement has come full circle."²⁷ Perhaps that statute only marked a temporary high point in the progress of labor which will some day be surpassed. We cannot know now, and our feelings in the matter have no bearings upon the case at hand. What is more important to a consideration of this case is that Congress contemporaneously with the adoption of Chapter 328, by the North Carolina General Assembly, determined that it had gone too far in licensing weapons which labor might use in obtaining its ends and that further restrictions thereon were necessary in the public interest. The Taft-Hartley Act²⁸ was primarily adopted for that purpose. The purpose and provisions of that statute, therefore, become highly important to a consideration of the contemporary conditions out of which Chapter 328 also emerged.

Section 1 of the National Labor Relations Act has found, as a basis for that statute, that the national welfare had

²⁵ Act of March 23, 1932, C. 90, 46 Stat. 70 and 73.

²⁶ The National Labor Relations Act, Act of July 5, 1935, C. 3725, 149 Stat. 499.

²⁷ Justice Jackson, dissenting opinion, *Hunt v. Crumbach* (1945), 325 US 821.

²⁸ The Labor Management Relations Act, Chapter 120, Public Law, 101.

been adversely affected by several stated malpractices of management in its dealings with labor. Section 1, of the Taft-Hartley Act restated those findings on the basis of evidence considered by Congress, finding that both labor and management were guilty of acts in their relationship to each other which necessitated mutual regulation in the public interest.²⁹ The industrial strife and disruption of the national economy which led to this finding of dual responsibility and blame are briefly summarized in the reports which accompanied the Senate and House Bills and the conference committee's report at the adoption of the Taft-Hartley Act of 1947.

[fol. 45] Section 7 of the Taft-Hartley Act prohibits the narrowly defined closed shop, and Section 8(3) permits a union shop subject to certain conditions. Section 14(b) supplements these sections by providing:

“(b) Nothing in that Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which

²⁹ “During the last few years the effects of industrial strife have at times brought our country to the brink of a general economic paralysis. Employees have suffered; employers have suffered; and above all the public has suffered. The enactment of comprehensive legislation to define clearly the legitimate rights of employers and employees in their industrial relations in keeping with the protection of the paramount public interest is imperative.” House of Representatives, 80th Congress, First Session, Report No. 245 (Accompanying HR 3020).

“We have felt that on the record before us the abuses of the system have become too serious and numerous to justify permitting present law to remain unchained. . . . Numerous examples were presented to the Committee of the way union leaders have used closed shop devices as a method of depriving employees of their jobs and in some cases a means of securing a livelihood in their trade or calling for purely capricious reasons.” Senate, 80th Congress, First Session (Report No. 105).

such execution or application is prohibited by State or Territorial Law.' ''³⁰

³⁰ The possible need for supplemental state legislation, based on the actual administration of the Taft-Hartley Act, was revealed by the chief administrative officer of the National Labor Relations Board, General Counsel Robert N. Denham, in a speech to the St. Louis Bar Association on November 3, 1947. In discussing the growth of bootleg contracts for union or closed shops made in defiance of the Taft-Hartley Act, Mr. Denham stated: "At this point, it also might be well to invite your attention to a situation which has arisen on many occasions since August 22. That is, there has been occasions when employers have enjoyed satisfactory relations with the union in their plant. The contract has expired since August 22, and the union and the employer are attempting to negotiate a new contract. There is no question of recognition involved, because the employer is quite willing to recognize the union and realizes that it does, in fact, represent a majority of his employees. But the union insists that the new contract contain a union shop provision. Let us assume that the union is one which has not complied with the requirements concerning filing certain data with the Secretary of Labor and certain affidavits of its officers with the National Labor Relations Board. In short, the union is not in a position where it can request the Board to conduct the usual union shop election. Nevertheless, the employer in seeking to maintain his relations with the union, accedes to the union's demands and executes a contract with the union shop provision in it without the required election among the employees. The National Labor Relations Board can not prevent such a contract and there is nothing inherently illegal in it, but it does not afford either the union or the employer any protection, because, if the employer should discharge an employee at the insistence of the union for having lost his good standing with the union, even if it should be for nonpayment of dues, such a discharge would constitute an unfair labor practice and the employer could expect that if charges were filed, he would be ordered to reinstate the employee; he might be ordered to make the employee whole for back pay loss, or the union, in such circumstances, might be required to make the employee whole out of its funds."

[fol. 46] The committee on Education and labor explained this provision to the House as follows: “. . . by section 13 the United States expressly declares the subject of compulsory unionism one that the States may regulate concurrently with the United States, notwithstanding that the agreements affect commerce, and notwithstanding that the State laws limit compulsory unionism more drastically than does Federal Law.”³¹

The report of the Senate Committee on Labor and Public Welfare³² discusses the Committee's findings and the evidence adduced by it which led to the enactment of the provisions referred to above. Those findings are so pertinent to the reasonableness and relevancy of the North Carolina “Right to Work Statute” that it behooves us to quote at length from the report.

“A controversial issue to which the committee has devoted the most mature deliberation has been the problem posed by compulsory union membership. It should be noted that when the railway workers were given the protection of the Railway Labor Act, Congress thought that the provisions which prevented discrimination against union membership and provided for the certification of bargaining representatives obviated the justification for closed-shop or union shop arrangements. That statute specifically forbids any kind of compulsory unionism.

The argument has often been advanced that Congress is inconsistent in not applying this same principle to the National Labor Relations Act. Under that statute a proviso to section 8(3) permits voluntary agreements for compulsory union membership provided they are made with an unassisted labor organization representing a majority of the employees at the time the contract is made. When the committees of the Congress in 1835 reported the bill which became the present National Labor Relations Act, they made clear that the proviso in section 8(3) was not intended to override State laws regulating the closed shop. The Senate committee stated that ‘the bill does nothing to

³¹ House Report, 245, 80th Cong., 1st sess. at P. 34.

³² Senate Report, 105, 80th Cong., 1st sess., PP. 5, 6, and 7.

facilitate closed-shop agreements or to make them legal in any State where they may be illegal' (S. Repr. No. 573, 74th Cong. 1st sess., p. 11; see also H. Rept. No. 1147, 74th Cong., 1st sess., pp. 19-20). Until the beginning of the war only a relatively small minority of employees (less than 20 per cent) were affected by contracts containing any compulsory features. According to the Secretary of Labor, however, within the last 5 years over 75 per cent now contain some form of compulsion. But with this trend, abuses of compulsory membership have become so numerous there has been great public feeling against such arrangements. This has been reflected by the fact that in 12 States such agreements have been made illegal either by legislative act or constitutional amendments, and in 14 other States proposals for abolishing such contracts are now pending. Although these regulatory measures have not received authoritative interpretation by the Supreme Court (see *A. F. of L. v. Watson*, 327 U. S. 582), it is obvious that they pose important questions of accommodating Federal and State legislation touching labor [fol. 47] relations "in industries affecting commerce (*Hill v. Florida*, 325 U. S. 438; see also, *Bethlehem Steel Co. v. N. Y. Labor Board*, decided by the Supreme Court April 7, 1947.) In testifying before this committee, however, leaders of organized labor have stressed the fact that in the absence of such provisions many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost.

"The committee has taken into consideration these arguments in reaching what it considers a solution of the problem which does justice to both points of view. We have felt that on the record before us the abuses of the system have become too serious and numerous to justify permitting present law to remain unchanged. It is clear that the closed shop which requires preexisting union membership as a condition of obtaining employment creates too great a barrier to free employment to be longer tolerated."

At this writing 15 States have been called to our attention in which laws have been adopted prohibiting closed

shops, either by constitutional amendment or by legislative act.³³ The provisions of this legislation are comparable or substantially similar to Chapter 328.³⁴ Great weight must be attached to the fact that so many separate jurisdictions have, within a short space of time, seen fit to exercise their police power in the same manner and for the same purposes. The composite will of such a broad cross section of our country cannot be lightly discarded as unreasonable, arbitrary or capricious or lacking in substantial relationship to its objective. "Since government is not an exact science, prevailing public opinion concerning the evils and the remedy is among the important facts deserving consideration; particularly, when the public conviction is both deep-seated and widespread and has been reached after deliberation."³⁵

The appellants contend that Chapter 328, together with Chapter 75 of the General Statutes, constitutes class legislation and is discriminating so as to deny them equal protection as guaranteed by the Fourteenth Amendment of the Federal Constitution and Article I, Sec. 17, of the State Constitution. The nature of the employer-employee relationship has itself long been recognized as constitutional justification for legislation applicable only to persons in that relative status.³⁶ The only question raised by the plea of discrimination is whether the statute applies alike to all employers and to all employees within its scope who may be found situated in like circumstances and conditions.³⁷

³³ In Arizona, Arkansas, Florida and Nebraska constitutional amendments of that character have been recently adopted:

³⁴ Such statutes have been enacted in Delaware, Georgia, Louisiana, Tennessee, Texas, Virginia, and Iowa.

³⁵ Justice Brandeis, dissenting opinion, *Truax v. Corrigan*, supra, p. 3. See also *Muller v. Oregon*, 208 U. S. 412.

³⁶ *New York Central Railroad Co. v. White*, 243 U. S. 188. *Arizona Employers Liability case*, 250 U. S. 400. *Second Employers Liability Case*, 223 U. S. 1. *Mullen v. Oregon*, supra.

³⁷ *Barbier v. Connolly*, 113 U. S. 27. *Hayes v. Missouri*, 120 U. S. 68.

Any legislation in exercise of the police power must perforce affect in different degrees persons or groups within its orbit who occupy different economic, social or political positions with reference to the ends sought by the legislation. Thus Chapter 328 may enable a non-union workman to obtain a "free ride" by receiving benefits attained through the expense and efforts of union workmen, but neither this nor other illustrations which might be given of the variable incidences of the statute upon persons differently circumstanced can render the Act discriminatory. Chapter 328 is geographically co-extensive with the State of North Carolina and its provisions are applicable with the same force to all employers within those boundaries just as they are applicable to all employees therein. It is difficult to see how, within the scope of its authority, the statute could be more uniform in its application.

We can see no merit in the appellants' proposition that Chapter 328 violates the Fourteenth Amendment by abridging the rights of free speech and assembly guaranteed by the First Amendment. That argument has been used successfully against a certain type of legislation restricting union activity. The Supreme Court of the United States in *Thornhill v. Alabama*, *supra*, held that a state statute prohibiting peaceful picketing was void as infringing upon the natural rights secured by the First Amendment. A [fol. 49] like result was reached in *Thomas v. Collins*, 323 U. S. 516, with respect to a state statute requiring procurement of an organization card as a prerequisite to the solicitation of workmen to join a union. However, Chapter 328 bears no resemblance to that type of statute. On the contrary, it seems to us that Chapter 328 may serve to secure the rights of free speech and assembly to all persons concerned. The statute protects the rights of workmen to organize; it further protects rights of workmen to express their individual opinions by refusing to join unions. The right of either side, or any faction of any side, to a labor controversy to assemble and publicize its own ideas remains inviolate.

The essence of the courts' decision in *Thornhill v. Alabama*, is contained in the following statements of Mr. Justice Murphy at pages 102 and 103 of the opinion: "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as

within that area of free discussion that is guaranteed by the Constitution. . . . Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern society." Mr. Justice Rutledge, speaking for the Court in *Thomas v. Collins*, stated at page 532, "The right to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as a part of free speech, but as a part of free assembly." Regardless of how salutary the net result of a closed shop agreement may be, it seems patent to us that the freedom of discussion and dissemination of ideas by all concerned in labor disputes are more restricted by such agreements than by a statute which stresses individual initiative and liberties by prohibiting the use of union membership or the absence thereof as a condition of employment.

The General Assembly of North Carolina has attempted to draw upon the residual powers of the State in an effort to remedy a situation of economic instability which has alarmed thinking people throughout the country. Those efforts have culminated in a prohibition upon the use of [fol. 50] union membership or the absence of union membership as a condition of employment or continued employment. Substantially the same result has been reached in many other state forums which have considered the problem and also to a limited degree by the Congress of the United States.³⁸ In one of those States, Florida, the people adopted a Constitutional Amendment having the same purpose and effect as Chapter 328. A three judge Federal

³⁸ See: The Labor Management Relations Act, discussed *supra*. The Railway Labor Act, Act of May 20, 1926 C. 347, 44 Stat. 577; as amended by Act of June 21, 1934, C. 691, 48 Stat. 1185; Act of April 10, 1936, C. 166, 49 Stat. 1189, among other things, prohibits closed shop or "yellow dog" contracts in the labor relations of railroads and airlines and their employees. The constitutionality of the statute has been broadly sustained. *Shields v. Utah-Idaho Cent. R. Co.*, 305 U. S. 177; *Virginia Ry. Co. v. System Federation No. 40*, 300 U. S. 315.

District Court held the amendment valid exercise of State police power.³⁹

State laws similar to Section 4 which outlaw "yellow dog contracts" were first ruled unconstitutional⁴⁰ but are now regarded as valid.⁴¹ The appellants have not questioned the constitutionality of Section 4. They contend, on the contrary, that such a provision outlawing contracts requiring abstinence from union membership should be held constitutional and that a contrary result should be reached respecting the corollary provisions of Sections 2, 3 and 5 prohibiting union membership from being made a requisite of employment. We cannot accept this view. In either instance, the state is merely delineating the area within which two factions with largely conflicting aims may wage their disputes without transgressing the public welfare. If the State may say to the employer, "you cannot deny work to anyone because of his membership in a union," we think it follows, *a fortiori*, that the state may say to the parties, "you cannot deny work to anyone because he is not a member of a union."⁴²

[fol. 51] We are not called upon here to determine the wisdom of the Legislature's action in adopting Chapter 328. Our sole concern must be whether the Legislature has acted within the limitations imposed upon it by the Fourteenth Amendment to the Federal Constitution and Article

³⁹ American Federation of Labor v. Watson, 6 F. Supp. 1010, reversed in 327 U. S. 582, on the grounds that the Florida Amendment has not been interpreted by the highest court of Florida.

⁴⁰ *Coppage v. Kansas*, 236 U. S. 1.

⁴¹ *C. NLRB v. Jones & Laughlin Steel Corp.*, 301 US 1; *Phelps-Dodge Corp. v. NLRB*, 313 U. S. 177.

⁴² "Accordingly, decision here has recognized that employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty. . . . The Constitution protects no less the employees converse right. Of course espousal of the cause of labor is entitled to no higher constitutional protection than the espousal of any other lawful cause. It is entitled to the same protection." *Thomas v. Collins*, *supra*.

I, Section 17, of the State Constitution.⁴³ In determining that question we believe that Article I, Section 17, should be viewed in the same light Justice Holmes regarded the Fourteenth Amendment: "There is nothing I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious to me and those whose judgment I respect."

[fol. 52] While, perhaps, we do not share the resentment expressed by the great Jurist, we may point out that the Congress seems to have made clear its intention to recognize as valid the particular experiment inaugurated by Chapter 328.

In summary, the case, stripped to decisional factors, falls into simple lines. The power of the State by general legislative act, in the exercise of its police power, to condemn private contracts found to be injurious to the public welfare, to declare them contrary to public policy and prevent their consummation cannot be denied. Exercised within constitutional limitations, it is both a necessary and a salutary function of government, the exercise of which is not infrequently an exigent duty. Within those limitations the occasion justifying the exercise of the power is within the legislative discretion, provided only that its action is not arbitrary or capricious and has a reasonable relation to the end sought to be accomplished.

⁴³ "The wisdom or lack of wisdom of a state statute or of a provision in a state constitution is not a matter for the courts. The people, through their representatives in the Legislature and through their vote for an amendment to their constitution, have the right to commit folly if they please, provided it is not prohibited by the Federal Constitution or antagonistic to Federal statutes authoritatively enacted concerning the matter involved. 'The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands.'" American Federation of Labor v. Watson, *supra*.

The rights of property guaranteed by our Constitution are necessarily relative to those held by others under the same Constitutional sanctions. The right of contract, whether considered as natural or merely civil, is a property right; certainly of no greater dignity than the right to work, ordinarily regarded as inalienable; and it cannot be unrestrictedly used to the injury of another. Under such circumstances the exercise of the State's police power in its regulation is not a violation of Due Process required by the Fourteenth Amendment. We cannot find that the legislature exceeded its powers. The General Assembly felt that it could no longer avoid the issue of the closed shop; and probably felt that so far as it concerned the principle which it felt should be preserved there is no substantial difference between the "closed shop" and the so-called "all union shop." We cannot say that the matter was not a proper subject of governmental regulation or that government has become so ensnared in its own charter as to be forced to admit its impotency.

Being of that opinion we further conclude that the record does not disclose error which would justify us in disturbing the result of the trial. We find no error.

No Error.

[fol. 52a] [File endorsement omitted.]

[fol. 53] IN SUPREME COURT OF NORTH CAROLINA, FALL TERM,
1947

No. 78, Buncombe County

STATE

vs.

GEO. WHITAKER, A. M. DEBRUHL, T. G. EMBLER, H. E.
SETZER, J. E. ROGERS, FRED BLACK & R. B. ROBERTSON

JUDGMENT—December 19, 1947

This cause came on to be argued upon the transcript of the record from the Superior Court, Buncombe County: Upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable A. A. F. Seawell, Justice, be certified to the said Superior Court, to the intent that proceedings be had therein in said cause according to law as declared in said opinion. And it is considered and adjudged further, that the Defendants do pay the costs of the appeal in this Court incurred, to wit, the sum of One Hundred Seventeen and 75/100 dollars (\$117.75), and execution issue therefor.

[fol. 54] IN THE SUPREME COURT OF NORTH CAROLINA

[Title omitted]

PETITION FOR ALLOWANCE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

To the Honorable W. P. Stacy, Chief Justice
of the Supreme Court of North Carolina:

Your petitioners, George Whitaker, A. M. DeBruhl, T. G. Embler, H. E. Setzer, J. E. Rogers, Fred Black and R. B. Robertson, respectfully show:

1. Petitioners are the appellants in the above entitled cause. Petitioner George Whitaker is a building contractor in the City of Asheville; petitioner A. M. DeBruhl is an officer of the Asheville Building and Construction Trades Council, and the remaining petitioners are officers and agents of local trade unions or craft organizations affiliated with the American Federation of Labor. Such petitioners, after being arrested on warrants and tried before a jury in the Police Court of the City of Asheville, were found guilty of violating Sections 2, 3 and 5 of Chapter 328 of the Sessions Laws of 1947. Such sections made it a misdemeanor, by reference to Chapter 75 of the general statutes, for any person to enter into any sort of closed-shop or union-security agreement or other agreement whereunder membership in a labor organization is made a condition of employment.

2. From the conviction, judgment and sentence of a \$50 fine, the defendants appealed to this Court, and on December 19, 1947, this Court entered a decision and judgment or decree affirming the conviction, judgment and sentence of the [fol. 53] court below. This Court is the highest court of

North Carolina in which a decision in this suit can be had, and this Court's decision and decree in this cause is final.

3. In this cause there was drawn in question the validity of Sections 2, 3 and 5 of Chapter 328 of the Sessions Laws of 1947 on the ground that said statute was repugnant to the Constitution and Laws of the United States, and the decision of this Court was in favor of the validity of such statute, notwithstanding your petitioners' contention, made both before the trial court and this Court, that the said statute violated the First and Fourteenth Amendments to the United States Constitution.

4. The errors upon which your petitioners claim to be entitled to an appeal are more fully set out in the assignment of errors, filed herewith, pursuant to Rules 9 and 13 of the Rules of the Supreme Court of the United States; and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States, as provided by Rules 12 and 46 of the Rules of the Supreme Court of the United States, which statement demonstrates that the federal questions are substantial and that the issues are of sufficient importance to warrant, indeed to require, consideration and determination by the Supreme Court of the United States.

Wherefore, your petitioners pray for the allowance of an appeal from the said Supreme Court of North Carolina, the highest court of said State in which a decision in this cause can be had, to the Supreme Court of the United States, in order that the decision and judgment or decree of the said Supreme Court of the State of North Carolina may be examined and reversed, and also pray that a transcript of the record, proceedings and papers in this cause, [fol. 56] duly authenticated by the Clerk of the Supreme Court of the State of North Carolina, under his hand and the seal of said Court, may be sent to the Supreme Court of the United States, as provided by law, and that an order be made touching the security to be required of the petitioners, and that the bond for costs and supersedeas tendered by the petitioners be approved.

George Pennell, 409 Legal Building, Asheville, North Carolina; J. Albert Woll; Herbert S. Thatcher, James A. Glenn, 736 Bowen Building, Washington 5, D.C., Counsel for Petitioners.

Dated this 6 day of February, 1948.

[fol. 57] IN THE SUPREME COURT OF NORTH CAROLINA

[Title omitted]

ASSIGNMENTS OF ERROR

Com~~e~~ now the above named appellants, and as appellants to the Supreme Court of the United States from the decision and judgment or decree heretofore entered herein, assign as error the following:

1. The Supreme Court of North Carolina erred in failing to hold that the said Sections 2, 3 and 5 of Chapter 328 of the Sessions Laws of 1947, by forbidding appellants under any and all circumstances to enter into any type of union-security agreement and by denying the union appellants their only proven and practical method of protecting their standards, stabilizing their gains, and obtaining an adequate share of the joint product of capital and labor, deprived such appellants of rights, liberties and freedoms protected under the Fourteenth Amendment to the United States Constitution, and in failing to hold that such absolute and unconditional proscriptions against entering into union-security agreements contained in Sections 2, 3 and 5 were arbitrary, unreasonable, excessive and without rational basis.
2. The Supreme Court of North Carolina erred in failing to hold that said Sections 2, 3 and 5 of Chapter 328 of the Sessions Laws of 1947, by favoring non-union workers over union workers, and by permitting employers to retain all their traditional methods of consolidating gains against competition of other employers and against demands of organized labor, while denying to union members their one method of improving their conditions and consolidating their gains against the competition of nonunion workers and against the competition of employers for a fair share in the national income, all without providing an adequate substitute method, deprived the union appellants of the equal protection of the law, contrary to the Fourteenth Amendment to the United States Constitution.
3. The Supreme Court of North Carolina erred in failing to hold that Sections 2, 3 and 5 of Chapter 328 of the Sessions Laws of 1947, by outlawing the union-security agreement, and thus imperiling the very existence of labor organizations and their ability adequately to function in the in-

terests of working people, restrained the union appellants in the exercise of fundamental rights of working people protected as a concomitant of the rights of speech and assembly under the First Amendment, and protected against invasion by the State under the Fourteenth Amendment.

4. The Supreme Court of North Carolina erred in holding that Sections 2, 3 and 5 of Chapter 328 of the North Carolina Sessions Laws of 1947, as enforced criminally either under Chapter 75 of the general statutes or under the common law of the State, are constitutional, valid and enforceable both on their face and, as applied in the present case, under the First and Fourteenth Amendments to the United States Constitution, and that the judgment and sentence imposed upon appellants by the trial court herein are constitutional, valid and enforceable under such First and Fourteenth Amendments; and in failing to hold to the contrary.

[fol. 59] Wherefore, on account of the errors hereinbefore assigned, petitioners pray that the said decision and judgment or decree of the Supreme Court of North Carolina, dated the 19th day of December, 1947, in the above entitled cause be reversed and judgment entered in favor of these appellants.

George Pennell, 409 Legal Building, Asheville, North Carolina; J. Albert Woll; ~~Herbert S. Thatcher~~; James A. Glenn, 736 Bowen Building, Washington 5, D. C., Counsel for Petitioners.

Dated this 6 day of March, 1948.

[fol. 60] IN THE SUPREME COURT OF NORTH CAROLINA

[Title omitted]

ORDER ALLOWING APPEAL AND SUPERSEDEAS

The petition of George Whitaker, A. M. DeBruhl, T. G. Embler, H. E. Setzer, J. E. Rogers, Fred Black and R. B. Robertson, the appellants in the above entitled cause, for an appeal in the above cause to the Supreme Court of the United States from the decision and decree of the Supreme Court of the State of North Carolina, having been filed with

the Clerk of this Court and presented. ~~Herein~~, accompanied by assignments of error and statement ~~as to~~ jurisdiction, all as provided by Rule 46 of the Rules of the Supreme Court of the United States, and the record in this cause having been considered, it is hereby

~~Ordered that an appeal be and it is hereby allowed to~~ the Supreme Court of the United States from the final decision and decree, dated the 19th day of December, 1947, of the Supreme Court of the State of North Carolina, as prayed in said petition, and that the Clerk of the Supreme Court of the State of North Carolina shall, within forty days from this date, make and transmit to the Supreme Court of the United States, under his hand and the seal of said Court, a true copy of the material parts of the record herein, which shall be designated by praecipe or stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

It is further ordered that the said appellants shall give a good and sufficient bond for costs and supersedeas in the [fol. 61] sum of Five Hundred (\$500) Dollars, that said appellants shall prosecute said appeal to effect and answer all costs and damages if they fail to make their plea good, and that said supersedeas bond, when filed and approved, shall stay the sending down of the mandate herein and of all proceedings in this cause until the final disposition of this cause by the Supreme Court of the United States.

W. P. Stacy, Chief Justice of the Supreme Court of the State of North Carolina.

Dated this 6th day of March, 1948.

[fols. 62-63] Bond on appeal for \$500.00 approved March 6, 1948, omitted in printing.

[fols. 64-65] Citation in usual form showing service on Harry McMullan, omitted in printing.

[fol. 66] IN THE SUPREME COURT OF NORTH CAROLINA

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD

To the Clerk of the Supreme Court of North Carolina:

Kindly prepare for transmittal to the Supreme Court of the United States a true copy of the entire record in this case, both as on appeal to this Court and to the Supreme Court of the United States, and including the decision and decree of the Supreme Court of the State of North Carolina. More specifically, such record shall include the following:

1. Organization of Court.
2. Warrant (Police Court).
3. Motion to Quash Warrant
4. Plea.
5. Jury and Verdict.
6. Motion for an Arrest of Judgment.
7. Judgment.
8. Appeal Entries.
9. State's Evidence.
10. Defendants' Evidence.
11. Exhibits 1 and 2.
12. Assignments of Error.
13. Stipulation of Counsel.
14. Decision and Decree of the Court.
- [fol. 67] 15. Petition for Allowance of Appeal.
16. Assignment of Errors.
17. Statement of Jurisdiction.
18. Service of Appeal Papers.
19. Bond on Appeal.
20. Proof of Service of Papers required by Rule 12.
21. Order allowing Appeal and Supersedeas.
22. Citation to Appellees.
23. Return on Citation to Appellees.
24. Statement directing attention to file statement of objections to jurisdiction of United States Supreme Court and Acceptance of Same.

25. Stipulation for transcript of record.

26. Clerk's Certificate.

Respectfully submitted, George Pennell, 509 Jackson Building, Asheville, North Carolina; J. Albert Woll; Herbert S. Thatcher; James A. Glenn, 726 Bowen Building, Washington 5, D. C., Counsel for Petitioners.

Dated this 6 day of March, 1948.

Agreed to by

Harry McMullan, Counsel for State of North Carolina.

[fol. 68] IN THE SUPREME COURT OF NORTH CAROLINA

[Title omitted]

CLERK'S CERTIFICATE

Appeal docketed 9 August, 1947.

Case argued 5 November, 1947

Opinion filed 19 December, 1947.

Final Judgment entered 19 December, 1947.

I, Adrian J. Newton, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and perfect copy of the record and proceedings in the above entitled case as the same now appear from the originals on file in my office.

I further certify that the rules of this Court prohibit filing of petitions to rehear in criminal cases.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at office in Raleigh, North Carolina, this the 6th day of March, 1948.

Adrian J. Newton, Clerk of the Supreme Court of the State of North Carolina. (Seal.)

[fol. 69] IN THE SUPREME COURT OF THE UNITED STATES

APPELLANTS STATEMENT OF POINTS AND DESIGNATION OF PARTS
OF RECORD TO BE PRINTED—Filed March 12, 1948

Comes now the appellants and adopt their assignments of error as their statement of the points to be relied upon, and represent that the whole of the record, as filed, is necessary for the consideration of the case.

J. Albert Woll, Herbert S. Thatcher, James A. Glenn,
736 Bowen Building, Washington 5, D. C.; George
Pennell, 509 Jackson Building, Asheville, North
Carolina.

Dated this 11th day of March, 1948.

[fol. 70] [File endorsement omitted.]

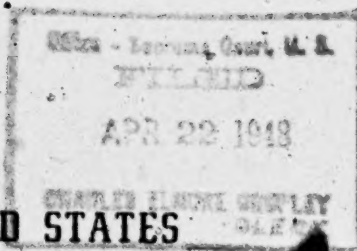
[fol. 71] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—March 29, 1948.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is assigned for argument immediately following No. 626, American Federation of Labor et al. vs. American Sash & Door Company et al.

Endorsed on Cover: File No. 52,890. North Carolina, Supreme Court, Term No. 660. George Whitaker, A. M. DeBruhl, T. G. Embler, et al., Appellants, vs. State of North Carolina. Filed March 8, 1948. Term No. 660, O. T. 1947.

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SUPREME COURT, U.S.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

1948

No. ~~761~~ 417

LINCOLN FEDERAL LABOR UNION #19129; AMERICAN FEDERATION OF LABOR, NEBRASKA STATE FEDERATION OF LABOR, ET AL.,

Appellants,

vs.

NORTHWESTERN IRON AND METAL COMPANY,
DAN GIEBELHOUSE, STATE OF NEBRASKA AND
NEBRASKA SMALL BUSINESS MEN'S ASSOCIATION

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA

STATEMENT AS TO JURISDICTION

J. ALBERT WOLL,
HERBERT S. THATCHER,
JAMES A. GLENN,
BERNARD S. GRADWOHL,
Counsel for Appellants.

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SUPREME COURT OF NEBRASKA

No. 32342

LINCOLN FEDERAL LABOR UNION #19129; AMERICAN FEDERATION OF LABOR, NEBRASKA STATE FEDERATION OF LABOR; AND HENRY RIECHEL, INDIVIDUALLY AND AS PRESIDENT OF SAID LINCOLN FEDERAL LABOR UNION #19129, PLAINTIFFS AND REPRESENTATIVES OF A CLASS,

Appellants,

vs.

NORTHWESTERN IRON AND METAL COMPANY, A CORPORATION; DAN GIEBELHOUSE; AND STATE OF NEBRASKA, DEFENDANTS AND REPRESENTATIVES OF A CLASS,

Appellees,

NEBRASKA SMALL BUSINESS MEN'S ASSOCIATION,

Intervenor

STATEMENT IN SUPPORT OF JURISDICTION

Appellants, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled case on appeal, respectfully show:

A

Statutory Provisions Sustaining Jurisdiction

The statutory provision which sustains the jurisdiction of the Supreme Court of the United States in this appeal

is Section 237(a) of the Judicial Code as amended, 28 U. S. C. A. 344(a).

The present case involves a final judgment in the highest court of the State of Nebraska where there was drawn in question the validity of a law of that State, namely, the so-called "Anti-Closed-Shop" Amendment to the Nebraska Constitution, on the grounds of its being repugnant to the United States Constitution, and the decision of that Court was in favor of the validity of such law. Under such circumstances, Section 237(a) permits appeal to the United States Supreme Court.

B

The Statute of the State the Validity of Which Is Involved

The statute of the State of Nebraska the validity of which was affirmed by the Nebraska Supreme Court, and which is involved in this appeal, is the so-called "Anti-Closed-Shop" Amendment. This Amendment reads as follows:

"Section 1.

No person shall be denied employment because of membership in or affiliation with, or resignation or expulsion from a labor organization or because of refusal to join or affiliate with a labor organization; nor shall any individual or corporation or association of any kind enter into any contract, written or oral, to exclude persons from employment because of membership in or non-membership in a labor organization.

"Section 2.

The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

"Section 3.

This article is self-executing and shall supersede all provisions in conflict therewith, legislation may be enacted to facilitate its operation but no law shall limit or restrict the provisions hereof."

C.

Date of Decision and Judgment or Decree and of Application for Appeal

The decision and judgment or decree of the Supreme Court of Nebraska, now sought to be reviewed, was rendered on March 19, 1948. The date on which the petition for appeal was presented was April 1, 1948.

D

Nature of Case and Existence of Federal Questions

Appellants are the appellants in the above entitled case and plaintiffs before the trial court. Appellant Lincoln Federal Labor Union #19129 is a voluntary unincorporated association, commonly known as a local labor union, affiliated with the American Federation of Labor, and whose members are employed in Lincoln, Nebraska, by the Northwestern Iron and Metal Company. Appellant American Federation of Labor is a voluntary unincorporated association of national and international unions and appears in this proceeding in a representative capacity. Appellant Nebraska State Federation of Labor is a voluntary unincorporated association of labor organizations affiliated with the American Federation of Labor and functioning within the State of Nebraska, and also appears in a representative capacity, both such Federations having members engaged in controversies similar to that in which appellant Lincoln Federal Labor Union #19129 is engaged. Appellant Henry Reichel is the duly elected President of the Lincoln Federal

Labor Union #19129 and is also employed by the appellee Northwestern Iron and Metal Company.

On February 19, 1947, appellants filed a complaint as plaintiffs in the District Court of Lancaster County, seeking a declaratory judgment and equitable relief in respect to the application or attempted application as against them of an amendment to the Constitution of the State of Nebraska, adopted in November of 1946 and commonly referred to as the "Anti-Closed-Shop" Amendment. Such amendment purported to outlaw all existing and future closed-shop or union-security agreements or other type of agreement requiring membership in a labor organization as a condition of employment. It reads as follows:

"Section 1.

No person shall be denied employment because of membership in or affiliation with, or resignation or expulsion from a labor organization or because of refusal to join or affiliate with a labor organization; nor shall any individual or corporation or association of any kind enter into any contract, written or oral, to exclude persons from employment because of membership in or non-membership in a labor organization.

"Section 2.

The term 'labor organization' means any organization of any kind, or any agency or employee representation committee plan, which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

"Section 3.

This article is self-executing and shall supersede all provisions in conflict therewith; legislation may be enacted to facilitate its operation but no law shall limit or restrict the provisions hereof."

The defendants named in the complaint were an employer, the Northwestern Iron and Metal Company; Dan

Giebelhouse, an employee of such employer; and the State of Nebraska. The Nebraska Small Business Men's Association, an organization of business firms operating in the State of Nebraska, moved for and were granted leave to appear in the case as an intervenor. The foregoing are the appellees herein.

The complaint alleged that prior to the adoption of the amendment the employees of the Northwestern Iron and Metal Company unanimously selected the appellant Lincoln Federal Labor Union #19129 as their bargaining representative and unanimously authorized such union to enter into a union-shop contract with the appellee Northwestern Iron and Metal Company. Such a contract, requiring all the employees to maintain their membership in good standing as a condition of employment, was entered into between the union and the employer also at a date prior to the effective date of the amendment. At a time following the effective date of the amendment, one of the employees, namely, Dan Giebelhouse, refused to pay his dues and lost his membership in the union. The union thereupon requested the employer to discharge such employee, but the employer, notwithstanding the express provision of its collective bargaining contract then in existence, refused to do so, taking the position that the anti-closed-shop amendment rendered the union-shop provisions invalid.

The plaintiffs alleged that the amendment in question was unconstitutional and void for the following reasons: (a) the amendment impaired the obligations of existing contracts in violation of Article I, Section 10, of the United States Constitution; (b) the amendment arbitrarily and unreasonably deprived plaintiffs of fundamental rights, liberties and freedoms protected under the Fourteenth Amendment to the United States Constitution; (c) the amendment deprived the plaintiffs of fundamental rights and freedoms guaranteed under the First Amendment as a concomitant of

the right of assembly and speech and protected against invasion by the State under the Fourteenth Amendment; and (d) the amendment denied the plaintiffs equal protection of the laws contrary to the Fourteenth Amendment.

The appellants sought the following relief in such complaint:

1. A declaratory judgment determining the rights, status and other legal relations of the parties to the contract with respect to said amendment and to declare said amendment to be unconstitutional and void as in conflict with the Federal Constitution.

2. An order requiring the employer to specifically perform its contract under its terms, and enjoining the Company from continuing Dan Giebelhouse in its employ.

The defendants moved, in effect, to dismiss the complaint on the ground that, since the amendment was constitutional, no cause of action was stated. The trial court granted such motions on such ground and, in doing so, considered and denied each of plaintiffs' contentions respecting the invalidity of the amendment under the Federal Constitution.

The plaintiffs then appealed to the Supreme Court of Nebraska, assigning as error the action of the trial court in refusing to sustain plaintiffs' contention that the amendment was unconstitutional in the various respects as set forth in the complaint and in refusing to grant the relief prayed. Pursuant to their appeal to the Supreme Court of Nebraska, plaintiffs briefed and argued the specific questions under the Federal Constitution that were raised before the trial court. Thus, it is evident that appellants raised the Federal questions that are now being argued before the United States Supreme Court at every possible opportunity.

On March 19, 1948, the Supreme Court of Nebraska handed down its decision and judgment in which it con-

sidered each of the Federal questions raised by the appellants, decided each of such questions adversely to the appellants' contentions and affirmed the judgment below. A copy of such decision is attached hereto as Exhibit "A".

E

Substantiality of Questions Involved

Appellants respectfully represent that the questions involved in their appeal to the Supreme Court of the United States are of a substantial nature. That Court has many times stated that an appeal will not be dismissed for want of a substantial Federal question unless the contentions of the appellants are "clearly not debatable and utterly lacking in merit." *Hamilton v. Regents of University of California*, 293 U. S. 245, 258.

The precise issues involved in the present case, namely, the validity under the Federal Constitution of an absolute prohibition of closed-shop or any other type of union-security agreements by the State, were presented to and accepted by the United States Supreme Court in *American Federation of Labor v. Watson*, 327 U. S. 582. While the Supreme Court remanded that case to the State court for clarification of the meaning and scope of the Florida anti-closed-shop law there involved, all the Justices indicated that the issues there presented were substantial and important ones fully warranting consideration and determination by the Court. In the present case the Nebraska law has been considered and construed by the highest court of Nebraska, which Court has held in respect to such law as follows: (1) the law impairs the obligations of union-security agreements entered into prior to the effective date of the law; (2) the law prevents the making or enforcement of agreements subsequent to the effective date of the law; (3) the law prohibits any attempt by an employer to employ

union members only, whether by formal agreement or otherwise; and (4) specifically, the law prevents enforcement of an agreement requiring an employee to maintain his good standing in the union as a condition of employment, and this even though such agreement was entered into prior to the effective date of the law.

The Nebraska anti-closed-shop amendment involved herein has thus been authoritatively and finally construed completely to outlaw, not merely to condition or regulate, the making of union-security agreements in the State and the enforcement of such agreements entered into prior to the passage of the Amendment, so that the use of such agreements is forbidden in the State under any and all circumstances and regardless of the desires of the parties involved or the inconsequential effect of any particular agreement upon the public health, safety and welfare. In his dissent in *Wallace Corporation v. National Labor Relations Board*, 323 U. S. 248, Justice Jackson quite aptly stated that "A closed shop is the ultimate goal of most union endeavor." The State of Nebraska, without a public need therefor, and with no ascertainable public benefit, has arbitrarily decreed that this goal shall no longer be obtainable. One hundred and fifty years of trade union history and experience, and the record in this case, have clearly demonstrated that agreements requiring union membership as a condition of employment constitute the *only* proven and effective means for working people to obtain and insure (1) their collective security and the maintenance of their labor unions once organization is achieved; (2) an equality of bargaining power as a means of obtaining an adequate share of the joint product of capital and labor; and (3) the consolidation of gains achieved in collective bargaining and the protection of working standards through elimination of the cutthroat wage competition of non-union employees. Further, the union shop constitutes the sole means of

achieving equality of sacrifice among employees by insuring that all who enjoy union wages and working conditions, obtained after years of struggle and deprivation, share in the cost of such benefits as members of the union rather than as "free riders." Not a few employers have found that such agreements result in stability of employment relationships, promotion of harmony and cooperation between employers and employees, and the elimination of jurisdictional strife and discord both in the plant and between rival labor organizations, and are an effective means of increasing production by eliminating suspicion and hostility, and freeing union energies and resources for constructive cooperation rather than defensive sparring.

Whether the State can constitutionally outlaw all union-security agreements is, therefore, a matter of gravest importance to the fifteen million members of organized labor in this country, as well as to an increasingly large number of employers throughout the Nation. As seen from a recent bulletin issued by the Department of Labor (Plaintiffs' "Exhibit A" attached to complaint in Record), almost 75% of the employees in all major industries now working under collective agreements are covered by union-security clauses. A decision by the United States Supreme Court is vitally necessary to remove the confusion and disruption occasioned by the law in question, and by similar laws passed in some twelve other States. The Supreme Courts of three States, in addition to Nebraska, namely, Arizona, North Carolina and Tennessee, have been presented with and have passed upon the validity of laws prohibiting any type of union-security agreement, and these decisions are being appealed to this Court. In each of these cases the Supreme Courts of the respective States noted the gravity of the question involved. It is respectfully submitted that the issue is one fully warranting consideration by the Supreme Court of the United States.

It is appellants' contention that, taking into consideration the traditional and important function of union-security agreements in our modern industrial society and, above all, their indispensability to the adequate and efficient functioning of the trade union movement of this country, the absolute prohibition of the union-security principle without equivalent substitute (such as might be found in State control as under the Railway Labor Act, or in compulsory arbitration), attempted under the Nebraska law, is arbitrary, excessive and without rational basis or justification either in the correction of any existing or cognizable abuses or in the protection of any public interest. Further, the law operates discriminatorily against organized workers and in favor both of employers and non-union employees in respect to the efforts and abilities of such classes of persons to achieve and maintain an adequate share in the national income. Economic, sociological and other factual material, either as contained in the record or concerning which the Court can take judicial notice, are available in support of these contentions and have been presented to the Nebraska Supreme Court and will be presented to the Supreme Court of the United States both in a principal brief and in an economic brief. Such material demonstrates that the prohibitions of the Nebraska law exceed the permissible range of police power as prescribed in such cases as *Nebbia v. New York*, 291 U. S. 502; *West Coast Hotel v. Parrish*, 300 U. S. 379; *Home Building & Loan v. Blaisdell*, 290 U. S. 398, and *Treigle v. Acme Homestead Association*, 297 U. S. 189. Further, it can be convincingly demonstrated that the legislation in question, providing as it does for complete prohibition rather than regulation of the institution of union security, and the total deprivation rather than conditioning, of constitutionally protected rights, is excessive and arbitrary under the doctrine of such cases as *Adams v. Tanner*.

244 U. S. 590; *D. E. Weaver v. Palmer Brothers Co.*, 270 U. S. 402; and *Liggett v. Baldridge*, 278 U. S. 105, regulation being amply sufficient to correct any possible abuses. As stated in the *Adams* case,

"Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."

In its decision, the Nebraska Supreme Court, although confronted with the issue of prohibition versus regulation, seemingly avoided any direct determination of this issue, and the same is true of the Supreme Courts of Arizona, North Carolina and Tennessee. Apparently, a determination by this Court is necessary to resolve the problem created by the doctrine of the *Adams* and other cases above cited.

Further, appellants assert impairment of rights of a more fundamental nature, entitled to greater protection under the Constitution than any right of property or contract. Union security goes to the very existence of labor organizations and their ability adequately to function on behalf of their members; the abolition of that institution, without any equivalent substitute, seriously impairs, if it

does not render completely ineffective,¹ the right of organization itself, upheld as a fundamental right in *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U. S. 1, and found to comprise a concomitant of the right of assembly and speech in *Thomas v. Collins*, 323 U. S. 516. Since essential civil and personal rights are involved, a stricter test than that of possible rational basis is required. "The right of a state to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect." (*West Virginia v. Barnette*, 319 U. S. 624.) "Mere legislative preference for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions." (*Thornhill v. Alabama*, 310 U. S. 88.)

The cases cited in the foregoing discussion involve appeals from determinations of state courts wherein the validity of state laws under the First and Fourteenth Amendments to the Constitution and under Article I, Section 10, thereof, was contested; those cases, accordingly, are authority supporting the jurisdiction of the Supreme Court of the United States over the present question where

¹ As stated by the Supreme Court of Illinois in *Kemp v. Division 241*, 255 Ill. 213, 99 N.E. 389.

to deny them the right to determine whether their best interests required that they should be associated in their work only with members of their organization would imperil their very existence."

similar constitutional issues have been raised and decided adversely by the Supreme Court of the State of Nebraska.

It is respectfully submitted that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Section 344(a) of Title 28 of the U. S. Code.

Respectfully submitted,

J. ALBERT WOLL,

HERBERT S. THATCHER,

JAMES A. GLENN,

736 Bowen Building,

Washington 5, D. C.;

BERNARD S. GRADWOHL,

Sharp Building,

Lincoln 8, Nebraska.

Dated this 1st day of April, 1948.

EXHIBIT A

No. 32342

LINCOLN FEDERAL LABOR UNION No. 19129, et al., *Appellants*,

vs.

NORTHWESTERN IRON AND METAL COMPANY, a Corporation,
et al., *Appellee*

N. W. 2d

Filed March 19, 1948

Constitutional Law: Master and Servant. Sections 13, 14, and 15, article XV, Constitution of Nebraska, are not in violation of any provision of the Constitution of the United States or in conflict with or repugnant to any federal law, but integrated therewith and, having a relationship to the public welfare, are a reasonable and valid exercise of police power by the state.

Appeal from the district Court for Lancaster County: Ralph P. Wilson, Judge. Affirmed.

Bernard S. Gradwohl and Herbert S. Thatcher, for appellants.

Walter R. Johnson, Attorney General; Clarence S. Beck, Robert A. Nelson, Edward R. Burke, Ralph W. Slocum, Swarr, May, Royce, Smith & Story, and Louis B. Finkelstein, for appellees.

Heard before Simmons, C. J.; Paine, Messmore, Yeager, Chappell, and Wenke, JJ., and Landis, District Judge.

CHAPPELL, J.:

By virtue of and in conformity with the self-executing provisions of section 2, article III, Constitution of Nebraska, the people of this state lawfully initiated, and on November 5, 1946, by a substantial majority adopted a constitutional amendment, which was proclaimed by the Governor as effec-

tive December 11, 1946. The amendment is now designated as sections 13, 14, and 15 of article XV, Constitution of Nebraska. See R. S. Supp., 1947. Hereinafter in this opinion it will be called the amendment.

This action was originally instituted by plaintiffs in the district court for Lancaster County to obtain a declaratory judgment with respect to the interpretation and constitutional validity of the amendment and to obtain equitable relief by specific performance and injunction. Defendant State of Nebraska filed a general demurrer to plaintiffs' petition, and all other defendants filed motions for judgment on the pleadings, thus making the issues entirely of law under such facts as were well pleaded in plaintiffs' petition.

The constitutional issues arose by virtue of plaintiffs' allegations that defendant Northwestern Iron and Metal Company, engaged in intrastate and interstate commerce, had breached its contract with plaintiff, Lincoln Federal Labor Union No. 19129, by the terms of which defendant company had agreed to discharge any employee who ceased to remain a member of the union in good standing. When defendant Dan Giebelhouse was suspended from plaintiff union for non-payment of dues, the company, upon notice thereof and demand by the union for his discharge, refused to do so, taking the position that the union shop provisions of the contract were invalidated and made unenforceable by virtue of the adoption of the amendment. Plaintiff Henry Reichel, an employee of defendant company and president of plaintiff Lincoln Federal Labor Union No. 19129, an affiliate of plaintiffs American Federation of Labor and Nebraska State Federation of Labor, took the position that the union shop provisions of the contract were not invalidated by the adoption of the amendment because it was unconstitutional for the reasons hereinafter set forth.

As held by this court in *Johnson v. Marsh*, 146 Neb. 257, 19 N. W. 2d 366: "A general demurrer admits all allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the conclusions of the pleader, except when supported by, and necessarily result from, the facts pleaded. It does not admit inferences of the pleader from the facts alleged,

nor mere expressions of opinion, nor theories of the pleader, nor allegations of the pleader as to what will happen in the future, nor arguments, nor allegations contrary to the facts of which judicial notice is taken or which are contrary to law." See, also, 41 Am. Jur., Pleadings, s. 244, p. 463, and *Louisville & Nashville R. R. Co. v. Palmes*, 109 U. S. 244, 3 S. Ct. 193, 27 L. Ed. 922.

Since a motion for judgment on the pleadings is in the nature of a demurrer and is in substance both a motion and a demurrer, it has application in like manner as a demurrer under circumstances similar to those presented in the case at bar. See, *Vaughan v. Omaha Winsett System Co.*, 143 Neb. 470, 9 N. W. 2d 792; *State ex rel. Western Reference & Bond Assn. v. Kinney*, 138 Neb. 574, 293 N. W. 393, reversed on other grounds as *Olsen v. Nebraska*, 131 U. S. 236, 61 S. Ct. 862, 85 L. Ed. 1305, 133 A. L. R. 1500.

In the light of the foregoing rules, the trial court sustained the demurrer and motion for judgment on the pleadings. Plaintiffs having elected to stand upon their petition, a judgment was entered in favor of defendants, declaring the amendment not in conflict with any federal law and constitutional as within the police power of the state, thereby making unlawful and unenforceable in Nebraska the provisions of the agreement between the parties whereby defendant agreed to discharge any employee who ceased to remain a member of the union in good standing, regardless of whether such agreement was executed before or after the effective date of the amendment.

Plaintiffs' motions for new trial were overruled, and they appealed to this court. In their brief they set forth at length some 12 assignments of alleged error. They may be summarized, however, as contending that the judgment of the trial court was contrary to law. Plaintiffs argued primarily that the amendment: (1) Impairs and previously restrains the exercise of the civil rights of assembly and speech guaranteed under the First Amendment, and as protected against state invasion by the Fourteenth Amendment; (2) constitutes class legislation and is highly discriminatory, denying unions and union members the equal protection of the laws, contrary to the Fourteenth Amendment; and, (3) arbitrarily and unreasonably impairs the obliga-

tions of existing contracts in violation of article I, section 10, and arbitrarily and unreasonably deprives plaintiffs of rights, liberties, and freedoms protected under the due process clause of the Fourteenth Amendment. We conclude that those contentions cannot be sustained.

The amendment specifically provides: "Sec. 13. No person shall be denied employment because of membership in or affiliation with, or resignation or expulsion from a labor organization or because of refusal to join or affiliate with a labor organization; nor shall any individual or corporation or association of any kind enter into any contract, written or oral, to exclude persons from employment because of membership in or non-membership in a labor organization. Sec. 14. The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. Sec. 15. This article is self-executing and shall supersede all provisions in conflict therewith; legislation may be enacted to facilitate its operation but no law shall limit or restrict the provisions hereof."

At the outset it should be stated that we are not permitted to base our decision of the issues upon a judicial interpretation of the wisdom of its adoption. *Lennox v. Housing Authority of City of Omaha*, 137 Neb. 582, 290 N. W. 451. We are confronted primarily with a question of sovereign power. As stated in the opinion of Chief Justice Taney in the License Cases, 5 How. 504, 582: "Upon this question the object and motive of the State are of no importance, and cannot influence the decision. It is a question of power." See, also, *Carpenters & Joiners Union v. Ritter's Cafe*, 315 U. S. 722, 62 S. Ct. 807, 86 L. Ed. 1143.

In *Arizona Employers' Liability Cases*, 250 U. S. 400, 419, 39 S. Ct. 553, 63 L. Ed. 1058, 6 A. L. R. 1537, it was said: "The States are left with a wide range of legislative discretion, notwithstanding the provisions of the Fourteenth Amendment; and their conclusions respecting the wisdom of their legislative acts are not reviewable by the courts."

In *Hennington v. Georgia*, 163 U. S. 299, 16 S. Ct. 1086, 41 L. Ed. 166, it was said: "The whole theory of our govern-

ment, Federal and state, is hostile to the idea that questions of legislative authority may depend . . . upon opinions of judges as to the wisdom or want of wisdom in the enactment of laws under powers clearly conferred upon the legislature."

As recently as *Olsen v. Nebraska*, *supra*, the Supreme Court of the United States said: "We are not concerned, however, with the wisdom, need, or appropriateness of the legislation. Differences of opinion on that score suggest a choice which 'should be left where . . . it was left by the Constitution—to the States and to Congress.'"

In *S. Buchsbaum & Co. v. Beman*, 14 F. Supp. 444, it was said: "Every possible presumption is in favor of the validity of the statute, and this continues until the contrary is shown beyond a rational doubt. In no doubtful case should a legislative act be pronounced contrary to the Constitution. One branch of the government cannot encroach upon the domain of another without danger. The safety of our institutions depends upon a strict observance of this salutary rule." See, also, *Sinking Fund Cases*, 99 U. S. 700, 25 L. Ed. 496; *Nicol v. Ames*, 173 U. S. 509, 19 S. Ct. 522, 43 L. Ed. 786; *Fairbank v. United States*, 181 U. S. 283, 21 S. Ct. 648, 45 L. Ed. 862; *Lennox v. Housing Authority of City of Omaha*, *supra*; 16 C. J. S., Constitutional Law, s. 99, p. 250.

In *National Labor Relations Board v. Jones & Laughlin*, 301 U. S. 1, 30, 57 S. Ct. 615, 81 L. Ed. 893, 108 A. L. R. 1352, it was said: "The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same." See, also, *S. Buchsbaum & Co. v. Beman*, *supra*; *Panama R. R. Co. v. Johnson*, 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748; *Blodgett v. Holden*, 275 U. S. 142, 48 S. Ct. 105, 72 L. Ed. 206; *Lucas v. Alexander*, 279 U. S. 573, 49 S. Ct. 426, 73 L. Ed. 851, 61 A. L. R. 906.

As a matter of course, the above rules have application in determining the validity of a constitutional amendment

adopted by virtue of the initiative, the first power constitutionally reserved by the people of this state.

All of which brings us to an interpretation of the amendment. It will be observed that section 14 thereof defines the term "labor organization" in the equivalent language used not only in the National Labor Relations Act, Title 29, U. S. C. A., s. 152 (5), but also in the Labor Management Relations Act, 1947, c. 120, Public Law 101, s. 2 (5). Therefore, nothing provided therein could effect the constitutionality of the amendment. No contention is made otherwise.

The constitutional questions are involved primarily because of sections 13 and 15. As we construe section 13, the first part thereof, down to the " ; " simply provides that the hiring and firing of no individual shall be dependent upon his membership or non-membership in a labor organization. He is thereby made free to "associate with his fellows" in a union entirely upon its merits, or to "decline to associate with his fellows" without imperiling his right either to obtain employment or to continue therein after having obtained it. In other words, the lawful right of the individual to enter employment and his lawful right to continue in his employment cannot be lawfully made to depend either upon the one condition or the other, and he is given a cause of action for violation of that right.

The second part of section 13, after " ; " is simply a correlation of the first and imposes the quality of illegality upon the provisions of any contract which would violate the first by excluding any person from employment because of membership or non-membership in a labor organization, and makes such provisions of any contract invalid and unenforceable as between the parties, without in any logical sense impairing or abridging the right of employees to self-organization and collective bargaining, established by Title 29, U. S. C. A., s. 157, hereinafter discussed.

It will be noted that section 15 makes the amendment self-executing, and it thereby became operative upon all such contracts as of its effective date. Therefore, if constitutionally valid as an exercise of the police power of the state, the amendment has application to prevent the enforcement of such provisions in all contracts, whether executed prior

to or after the effective date of the amendment. As we view the matter, however, and as the parties involved herein, as well as the trial court, must also have viewed it, the amendment was not intended to and could not so operate as to invalidate and make unenforceable all the other valid provisions of the collective bargaining agreement then existing between the parties. In other words, valid collective bargaining agreements, either existent on the effective date of the amendment or entered into thereafter, would be enforceable in all respects except the provisions in such agreements which would be in conflict with the amendment.

It was argued in the district court that the amendment was invalid because in conflict with the National Labor Relations Act. However, since that argument was made, Congress has passed the Labor Management Relations Act of 1947, which, after specifically amending the National Labor Relations Act, provided, among other things: "Sec. 14. (b) Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

While such provision would seem to conclusively dispose of plaintiffs' argument, the constitutionality thereof has not yet been determined, and, since plaintiffs still contend that the amendment conflicts with paramount federal law, we feel impelled to discuss and decide plaintiffs' contention.

The constitutionality of the National Labor Relations Act has been conclusively affirmed, and in a manner clearly indicating that the validity of the above provision of the Labor Management Relations Act will also be constitutionally affirmed. See *National Labor Relations Board v. Jones & Laughlin*, *supra*. In any event, we conclude that the amendment was not in conflict with the National Labor Relations Act, and, having been adopted prior to enactment of the Labor Management Relations Act, the amendment is integrated therewith.

It was said in *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U. S. 767, 67 S. Ct. 1026, 91 L. Ed. 887: "In the National Labor Relations Act, Congress has sought to reach some aspects of the employer-employee

relation out of which such interferences arise. It has dealt with the subject or relationship but partially, and has left outside of the scope of its delegation other closely related matters. Where it leaves the employer-employee relation free of regulation in some aspects, it implies that in such matters federal policy is indifferent, and since it is indifferent to what the individual of his own volition may do we can only assume it to be equally indifferent to what he may do under the compulsion of the state."

Allen-Bradley Local v. Wisconsin Employment Relations Board, 315 U. S. 740, 62 S. Ct. 820, 86 L. Ed. 1154, is authority for the proposition that the intent of Congress to exclude the States from exercising their police power in the field of commerce must be clearly manifest. In discussing the National Labor Relations Act and its relationship to that premise, the court said: " * * * an 'intention of Congress to exclude States from exerting their police power must be clearly manifested.' * * * We will not lightly infer that Congress by the mere passage of a federal Act has impaired the traditional sovereignty of the several States in that regard. * * * Nor can we say that the control which Congress has asserted over the subject matter of labor disputes is so pervasive (Cf. *Cloverleaf Butter Co. v. Patterson*, *ante*, p. 148) as to prevent Wisconsin, under the familiar rule of *Pennsylvania R. Co. v. Public Service Comm'n*, 250 U. S. 566, 569, from supplementing federal regulation in the manner of this order. Sec. 7 of the federal Act guarantees labor its 'fundamental right' (*Labor Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33) to self-organization and collective bargaining. Sec. 8 affords employees protection against unfair labor practices of employers including employer interference with the rights secured by sec. 7. * * * If the order of the state Board affected the status of the employees, or if it caused a forfeiture of collective bargaining rights, a distinctly different question would arise. But since no such right is affected, we conclude that this case is not basically different from the common situation where a State takes steps to prevent breaches of the peace in connection with labor disputes. Since the state system of regulation, as construed and applied here, can be reconciled with the federal Act and since the two as focused in this case

can consistently stand together, the order of the State Board must be sustained under the rule which has long obtained in this Court. See *Sinnot v. Davenport*, 22 How. 227, 243."

In *Phelps Dodge Corporation v. National Labor Relations Board*, 313 U. S. 177; 61 S. Ct. 845, 85 L. Ed. 1271, 133 A. L. R. 1217, it was said: "And so the present Act, codifying this long history, leaves the adjustment of industrial relations to the free play of economic forces but seeks to assure that the play of those forces be truly free. * * * The prohibition against 'discrimination in regard to hire' must be applied as a means towards the accomplishment of the main object of the legislation. * * *

"The natural construction which the text, the legislative setting and the function of the statute command, does not impose an obligation on the employer to favor union members in hiring employees. He is as free to hire as he is to discharge employees. The statute does not touch 'the normal exercise of the right of the employer to select its employees or to discharge them.' It is directed solely against the abuse of that right by interfering with the counterbalancing right of self-organization.

"We have already recognized the power of Congress to deny an employer the freedom to discriminate in discharging. *Labor Board v. Jones & Laughlin*, 301 U. S. 1."

As stated in *Associated Press v. National Labor Relations Board*, 301 U. S. 103, 132, 57 S. Ct. 650, 81 L. Ed. 953: "The act does not compel the petitioner to employ any one; * * *"

In *National Labor Relations Board v. Jones & Laughlin*, *supra*, it was said: "The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion."

As stated in *National Labor Relations Board v. National Casket Co.*, 107 Fed. 2d 992: "The purpose of the Act is not

to compel an employer to hire members of one union rather than another, or union men rather than non-union men."

In *International B. of P. M. v. Wisconsin E. R. Board*, 249 Wis. 362, 24 N. W. 2d 672, the principal contention of the union was that section 8 (3) of the National Labor Relations Act conferred upon unions and employers the right to enter into an agreement for a closed shop, and that the Wisconsin Employment Peace Act, limiting that right, was in conflict with it.

In that opinion it was said: "Counsel have repeatedly argued to this Court that sec. 8 (3), National Labor Relations Act, already quoted, confers a right. Departing from the precise language of sub. (3), the proviso is as follows: Nothing in this act shall preclude an employer from making an agreement with a labor organization which requires as a condition of employment membership in a union. Just how this clause grants a right, it is difficult to see."

At another point in the opinion it was said: "It is well settled that reports of committees of the house of representatives and of the senate may be consulted to ascertain the intent of Congress as to the meaning of a statute enacted by it. *Wright v. Vinton Branch, etc.* (1937) 300 U. S. 440, 57 Sup. Ct. 556, 81 L. Ed. 736, 112 A. L. R. 1455, and cases cited in Note 8, p. 1463.

"Referring now to Senate Reports 74th Congress, 1st session (1935) Report No. 573, we find the following (p. 11):

"Problem of the Closed Shop

"* * * Propaganda has been widespread that this proviso attaches special legal sanctions to the closed shop or seeks to impose it upon all industry. This propaganda is absolutely false. * * * The committee feels that this was not the intent of Congress * * *; that it is not the intent of Congress today; and that it is not desirable to interfere in this drastic way with the laws of the several states on this subject.

"But to prevent similar misconceptions of this bill, the proviso in question states that nothing in this bill, or in any other law of the United States, or in any code or agreement approved or prescribed thereunder, shall be held to prevent

the making of closed-shop agreements between employers and employees. In other words, the bill does nothing to facilitate closed-shop agreements or to make them legal in any state where they may be illegal; it does not interfere with the status quo on this debatable subject but leaves the way open to such agreements as might now legally be consummated, with two exceptions about to be noted.

“The assertion that the bill favors the closed shop is particularly misleading in view of the fact that the proviso in two respects actually narrows the now existent law regarding closed-shop agreements. * * *

“Secondly, the bill is extremely careful to forestall the making of closed-shop agreements with organizations that have been “established, maintained, or assisted” by any action defined in the bill as an unfair labor practice. * * *

The opinion then went on to say: “This report sustains the construction of the proviso that we have adopted (*International B. of E. W. v. Wisconsin E. R. Board*, 245 Wis. 532, 15 N. W. 2d 823), that is, that it granted no right but if there were any impediments to such an agreement in the laws of the United States, they were removed by the provisions of sec. 8 (3), * * *

“From the report of the committee it appears that Congress intended to leave state laws regarding the closed shop in force.”

Section 14 (b) of the Labor Management Relations Act, which cannot be construed as an invalid delegation of legislative authority, re-established that intent beyond peradventure of a doubt.

The federal public policy in regard to compulsory membership in labor unions was stated in Title 29, U. S. C. A., s. 102, wherein it was said, “* * * he should be free to decline to associate with his fellows, * * *

Title 29, U. S. C. A., s. 157, provides: “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.” The amendment involved here cannot be construed as impairing, denying, or abridging the

right of employees to join and organize into a union and bargain collectively with an employer in conformity with federal law, as provided in that section. It is a matter of common knowledge that many collective bargaining agreements have been and are now being entered into in this state since the adoption of the amendment, which brooks no interference therewith by the employer, and makes the employee directly free from coercion or discrimination by either the employer or the union or members thereof. It does not prohibit such contracts or the enforcement thereof. It does, however, simply make invalid and unenforceable as between the parties, any provision therein agreeing to exclude persons from employment because of membership or non-membership in a labor organization.

We are unable to find any labor legislation enacted by Congress requiring an employee to belong or not belong to a labor organization in order to receive the benefits thereof, or for any other purpose. As a matter of fact, the Railway Labor Act, Title 45, U. S. C. A., c. 8, the constitutionality of which was conclusively affirmed in *Virginia Ry. Co. v. System Federation*, 300 U. S. 515, 57 S. Ct. 592, 81 L. Ed. 789, and discussed by laudatory language in *Labor Board v. Jones & Laughlin*, *supra*, specifically provides in s. 152 (5): "No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way." The amendment at bar certainly does no more than exemplify and apply that policy to all employers and employees in this state.

Plaintiffs argued that the amendment impairs and restrains the exercise of civil rights of assembly and free speech guaranteed by the First Amendment and protected by the Fourteenth Amendment to the Constitution of the United States. The wording of the act is not ambiguous. We cannot by any construction conclude that it violates the First Amendment by abridging freedom of speech, or the press, or the right of assembly, or the right of petition to

the government for redress. As a matter of fact, it preserves to all employees the right to organize and join a union and the right to bargain collectively without fear of reprisal. Instead of preventing or abridging rights of speech, press, assembly, or petition, guaranteed by the First Amendment, the amendment preserves it for all employees, not only to those who join but also to those who do not join a union. Therefore, the amendment does not abridge the privileges or immunities of any citizen of the United States in violation of the Fourteenth Amendment, but affirmatively protects those rights. See *American Federation of Labor v. Watson*, 60 F. Supp. 1010; *State v. Whitaker*, — N. C. —, 45 S. E. 2d 860; *American Federation of Labor v. American Sash & Door Co.*, — Ariz. —, — P. 2d —.

Plaintiffs argued that the amendment constituted class legislation and denied unions and union members equal protection of the laws, contrary to the Fourteenth Amendment. We cannot sustain that contention. The amendment prohibits no one from joining a union, but undertakes to lawfully assert that neither membership nor non-membership in a union shall be a condition precedent to the right to work. It is inclusive of all employers and employees in this state. It does not deny the union member the equal protection of the law, but gives the non-union employee a protection of the law which he had not theretofore enjoyed. See *American Federation of Labor v. Watson*, *supra*.

The amendment complies strictly with the guiding principle most often stated by courts to the effect that: “* * * this constitutional guaranty requires that all persons shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.” 12 Am. Jur., Constitutional Law, s. 469, p. 129.

As stated in *Barbier v. Connolly*, 113 U. S. 27, 5 S. Ct. 357, 28 L. Ed. 923, and approved in *Truax v. Corrigan*, 257 U. S. 312, 333, 42 S. Ct. 124, 66 L. Ed. 254, 27 A. L. R. 375: “Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.”

In *Hayes v. Missouri*, 120 U. S. 68, 7 S. Ct. 350, 30 L. Ed. 578, the court, in speaking of the equal protection clause of the Fourteenth Amendment, said: "It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed."

It was said in *Truax v. Corrigan*, *supra*: "... the guaranty was intended to secure equality of protection not only for all but against all similarly situated. Indeed, protection is not protection unless it does so."

In *Yick Wo v. Hopkins*, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220, speaking of due process and the equality clause of the Fourteenth Amendment, the court said: "These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."

We come then to plaintiffs' contention that the amendment deprives them of rights and privileges under the due process clause of the Fourteenth Amendment. We conclude that it does not. In that connection, we are required to discuss and decide whether or not the amendment is within the police power of the state and whether or not it is reasonable and has a relationship to the public welfare. As related to legislation, it is generally held that due process is satisfied if there was legislative power to act on the subject matter; if that power was exercised in a reasonable and indiscriminatory manner, and if the act, being definite, has a reasonable relationship to a proper legislative purpose. 16 C. J. S., Constitutional Law, s. 569, p. 1156; *Rein v. Johnson*, 149 Neb. 67, 30 N. W. 2d 548.

It will be noted at the outset that by virtue of the Tenth Amendment, Constitution of the United States: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." That provision cannot be amended or obliterated by judicial decree, but only by the source from which it derived original validity.

Therefore, in construing a federal law, courts look to see if the power has been delegated, but in construing a

state law they look to see if it has been prohibited, realizing that the people of a state, by reason of the sovereign power vested in them, may enact a law or alter and amend their own constitution by the method prescribed in the instrument itself, subject, however, to every limitation or restraint lawfully imposed upon them by virtue of some authority derived from the Constitution of the United States. See 11 Am. Jur., Constitutional Law, s. 245, p. 966, *et seq.*

"Police power is the exercise of the sovereign right of a government to promote order, safety, health, morals, and the general welfare of society, within constitutional limits.

* * * As applied to the powers of the states of the American Union, the term is also used to denote those inherent governmental powers which, under the federal system established by the Constitution of the United States, are reserved to the several states." 16 C. J. S., Constitutional Law, s. 174, p. 537. See, also, 11 Am. Jur., Constitutional Law, s. 255, p. 986.

In *Reid v. Colorado*, 187 U. S. 137, 148, 23 S. Ct. 92, 47 L. Ed. 108, it was said: "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that 'in the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.' *Sinnot v. Davenport*, 22 How. 227, 243."

As recently as *Placek v. Edstrom*, 148 Neb. 79, 26 N. W. 2d 489, which involved the state par-check law, this court, in conformity with federal precedent, held that: "No provision of the Constitution of the United States was ever intended to take from states the right to properly exercise their police powers which generally extend to all the great public needs which are lawfully recognized as immediately necessary to promote the public welfare."

It was said recently in *Abeln v. City of Shakopee*, — Minn. —, 28 N. W. 2d 642: "Clearly, the original Constitution did not deprive the states of their police power, which

they might exercise for the protection of the public health, welfare, and morals. • • • No restraints were imposed upon the police power by the adoption of the Fourteenth Amendment."

As early as *Wenhan v. State*, 65 Neb. 394, 91 N. W. 421, in which the constitutionality of a statute regulating and limiting the hours of employment for female employees was sustained, this court said: "The police power of the state can not be put forward as an excuse for oppressive and unjust legislation, but it may be lawfully resorted to for the purpose of preserving the public health, safety or morals, and a large discretion is vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests."

Fansteel Metallurgical Corporation v. Lodge 66, 295 Ill. App. 323, 14 N. E. 2d 991, is authority for the proposition that Congress, by its enactment of the National Labor Relations Act, did not deprive or attempt to deprive the states of their police power.

In *Thomas v. Collins*, 323 U. S. 516, 532, 65 S. Ct. 315, 89 L. Ed. 430, it was said: "That the State has power to regulate labor unions with a view to protecting the public interest is, as the Texas court said, hardly to be doubted. They cannot claim special immunity from regulation." See, also, *Railway Mail Assn. v. Corsi*, 326 U. S. 88, 65 S. Ct. 1483, 89 L. Ed. 2072, sustaining the New York anti-discrimination statute.

In *Carpenters & Joiners Union v. Ritter's Cafe*, *supra*, it was said: "It is not for us to assess the wisdom of the policy underlying the law of Texas. Our duty is at an end when we find that the Fourteenth Amendment does not deny her the power to enact that policy into law."

In that opinion the court also said: "The right of the state to determine whether the common interest is best served by imposing some restrictions upon the use of weapons for inflicting economic injury in the struggle of conflicting industrial forces has not previously been doubted. See Mr. Justice Holmes in *Aikens v. Wisconsin*, 195 U. S. 194, 205, and Mr. Justice Brandeis in *Truax v. Corrigan*, *supra*, at 372, *Dorchy v. Kansas*, 272 U. S. 306, 311, and

Senn v. Tile Layers Protective Union, 301 U. S. 468, 481.

• • • We must be mindful that 'the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants.' *Thornhill v. Alabama*, 310 U. S. 88, 103-04."

In *Barbier v. Connolly*, *supra*, it was said: "But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity."

In *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 65 S. Ct. 1515, 89 L. Ed. 1915, it was said: "Although the commerce clause conferred on the national government power to regulate commerce, its possession of the power does not exclude all state power of regulation. Ever since *Willson v. Black-Bird Creek Marsh Co.*, 2 Pet. 245, and *Cooley v. Board of Wardens*, 12 How. 299, it has been recognized that, in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it."

In *Parker v. Brown*, 317 U. S. 341, 359, 63 S. Ct. 307, 87 L. Ed. 315, it was said: "The governments of the states are sovereign within their territory save only as they are subject to the prohibitions of the Constitution or as their action in some measure conflicts with powers delegated to the National Government, or with Congressional legislation enacted in the exercise of those powers. This Court has repeatedly held that the grant of power to Congress by the Commerce Clause did not wholly withdraw from the states the authority to regulate the commerce with respect to matters of local concern, on which Congress has not spoken."

At another point in the opinion, the court said: "Because of its local character also there may be wide scope for local regulation without substantially impairing the national interest in the regulation of commerce by a single authority and without materially obstructing the free flow of commerce, which were the principal objects sought to be secured by the Commerce Clause. * * * There may also be, as in the present case, local regulations whose effect upon the national commerce is such as not to conflict but to coincide with a policy which Congress has established with respect to it."

In speaking of police power reserved to the states, it was said in the opinion of Chief Justice Taney in the License Cases; *supra*: "It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the Constitution of the United States."

The above-quoted statement was approved in *Nebbia v. New York*, 291 U. S. 502, 525, 54 S. Ct. 505, 78 L. Ed. 940, 89 A. L. R. 1469, wherein it was also said: "The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. * * * The reports of our decisions abound with cases in which the citizen, individual or corporate, has vainly invoked the Fourteenth Amendment in resistance to necessary and appropriate exertion of the police power." See, also, 16 C. J. S., Constitutional Law, s. 569 (3), p. 1156.

The legislative and judicial history of the exercise of police power, together with a synopsis of its elasticity, adaptability, and appropriate application to the relationship between employers and employees, will be found in the dissenting opinion of Justice Brandeis in *Truax v. Corri-*

gan, *supra*. Like history will also be found in *State v. Whitaker, supra*, which held constitutional a statute of North Carolina, sections 2, 3, and 4 of which were similar to the Nebraska amendment in all material respects.

It was said in *American Federation of Labor v. Watson, supra*: "Labor and labor unions are affected with a public interest and are subject to the regulatory power of the states for any reasonable regulation which will not be inconsistent with the Constitution of the United States and statutes enacted within the scope delegated by the Constitution to the Congress."

Without doubt the amendment was within the police power of this state. Therefore, we turn to the question of whether or not it is reasonable and has a relationship to the public welfare. In that connection we conclude that it is reasonable and that it does have such relationship.

In *Gundling v. Chicago*, 177 U. S. 183, 20 S. Ct. 633, 44 L. Ed. 725, it was said: "* * * unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizens are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference."

It was said in the opinion of Justice McLean in the License Cases, *supra*: "In all matters of government, and especially of police, a wide discretion is necessary. It is not susceptible of an exact limitation, but must be exercised under the changing exigencies of society. In the progress of population, of wealth, and of civilization, new and vicious indulgencies spring up, which require restraints that can only be imposed by the legislative power."

In *Muller v. Oregon*, 208 U. S. 412, 28 S. Ct. 324, 52 L. Ed. 551, a statute regulating and limiting the hours of labor for female employees was sustained. In the opinion it was said: "Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same

time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge."

In *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 399, 57 S. Ct. 578, 81 L. Ed. 703, 108 A. L. R. 1330, it was said: "The legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection. The adoption of similar requirements by many States evidences a deepseated conviction both as to the presence of the evil and as to the means adapted to check it. Legislative response to that conviction cannot be regarded as arbitrary or capricious, and that is all we have to decide. Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment."

We call attention to an appropriate statement appearing in *Home Building & Loan Assn. v. Blaisdell*, 290 U. S. 398, 442, 54 S. Ct. 231, 78 L. Ed. 413, 88 A. L. R. 1481: "It is manifest from this review of our decisions that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contraction of the public domain; the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very basis of individual opportunity. Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends.

"It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision

of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption, it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—'We must never forget that it is a *Constitution* we are expounding' (*McCulloch v. Maryland*, 4 Wheat, 316, 407) — 'a constitution intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs.' *Id.* p. 415. When we are dealing with the words of the Constitution, said this Court in *Missouri v. Holland*, 252 U. S. 416, 433, 'we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.

* * * The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.'

'Nor is it helpful to attempt to draw a fine distinction between the intended meaning of the words of the Constitution and their intended application'. When we consider the contract clause and the decisions which have expounded it in harmony with the essential reserved power of the States to protect the security of their peoples, we find no warrant for the conclusion that the clause has been warped by these decisions from its proper significance or that the founders of our Government would have interpreted the clause differently had they had occasion to assume that responsibility in the conditions of the later day. The vast body of law which has been developed was unknown to the fathers, but it is believed to have preserved the essential content and the spirit of the Constitution. With a growing recognition of public needs and the relation of individual right to public security, the court has sought to prevent the perversion of the clause through its use as an instrument to throttle the capacity of the States to protect their fundamental interests. This development is a growth from the seeds which the fathers planted. It is a development forecast by the pro-

phetic words of Justice Johnson in *Ogden v. Saunders*, already quoted. And the germs of the later decisions are found in the early cases of the Charles River Bridge and the West River Bridge, *supra*, which upheld the public right against strong insistence upon the contract clause. The principle of this development is, as we have seen, that the reservation of the reasonable exercise of the protective power of the State is read into all contracts”

In *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 488, 41 S. Ct. 172, 65 L. Ed. 349, 16 A. L. R. 196, Mr. Justice Brandeis in a dissent, said: “All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest, and to declare the duties which the new situation demands.”

The people of this state initiated the amendment by original action, without legislative intervention, by filing petitions with the Secretary of State, which were signed by ten percent or more of the electors of the state, so distributed as to include five percent or more of the electors of each of two-fifths or more of the counties of the state. At the election the amendment was adopted by a vote of 212,443 for and 142,702 against. It is common knowledge that its provisions and purposes, as well as the reasons for its adoption or rejection, were widely publicized and ably presented to the electorate of this state prior to the election. It was adopted after considerate and deliberate action. Thus it was decided that its provisions were reasonable and necessary to safeguard the integrity of government and preserve the economic structure and security of the people for the protection of their welfare. With that decision, courts have no right to interfere.

As conditions arising out of powerful industries required legislative regulation thereof to protect first the public generally, and then labor itself, which legislation courts generally have sustained, so now the people of this and other states have evidently decided that conditions have

arisen in powerful industries and powerful labor forces as well, requiring legislative regulation of them both in order to protect the public. The Labor Management Relations Act of 1947 was ostensibly enacted for that purpose. As a basis for its enactment, Congress recognized, as disclosed by its committee reports, that such conditions were nationwide in scope, and specifically provided for the integration of state laws therewith, characterized by the amendment already adopted in this state.

We take judicial notice of the fact that at this writing no less than 18 states have enacted similar legislation, 6 by constitutional enactment and 12 by statutory provisions.

Florida's constitutional amendment was sustained by an able opinion in *American Federation of Labor v. Watson*, *supra*. True, upon appeal therefrom, the Supreme Court of the United States (327 U. S. 582) refused to finally pass upon the constitutionality of the Florida amendment until it had been authoritatively construed by the state court, but nevertheless the opinion established a yardstick for its constitutional measurement which affirmatively parallels and sustains our construction of the amendment in the case at bar.

The Supreme Court of Arizona in *American Federation of Labor v. American Sash & Door Co.*, *supra*, sustained the constitutionality of that state's constitutional amendment, which is very similar to the one here involved.

Likewise, the Supreme Court of Tennessee, in *Mascari v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America*, — Tenn. —, — S. W. 2d —, sustained the constitutionality of that state's legislative act, sections 1 and 2 of which are almost identical with this state's constitutional amendment.

In the light of the foregoing, we conclude that the amendment is a reasonable and valid exercise of the police power of the state, and as such has a real and substantial relation to its object, the public welfare.

Bearing in mind the foregoing related propositions of law, we turn to the question whether the amendment impairs the obligations of existing contracts in violation of article I, section 10, Constitution of the United States. We conclude that it does not.

Wenham v. State, *supra*, involved the constitutionality of an act regulating and limiting the hours of employment for female employees. In that opinion this court specifically held that such an act was not class legislation, and that the act was only a fair and reasonable exercise of the police power, in that it did not prohibit the right of contract but merely regulated the same in a reasonable manner as in the case at bar. In that connection, the court said: "The right of contract itself is subject to certain limitations which the state may lawfully impose in the exercise of its police power, and this power has been greatly expanded in its application during the past century, * * *."

In *Patterson v. Bark Eudora*, 190 U. S. 169, 23 S. Ct. 821, 47 L. Ed. 1002, it was said: "That there is, generally speaking, a liberty of contract which is protected by the Fourteenth Amendment may be conceded, yet such liberty does not extend to all contracts. As said in *Frisbie v. United States*, 157 U. S. 160, 165: 'While it may be conceded that, generally speaking, among the inalienable rights of the citizen is that of the liberty of contract, yet such liberty is not absolute and universal. It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. It may * * * restrain all engaged in any employment from any contract in the course of that employment which is against public policy.'"

As stated in *Müller v. Oregon*, *supra*: "It is undoubtedly true, as more than once declared by this court, that the general right to contract in relation to one's business is part of the liberty of the individual, protected by the Fourteenth Amendment to the Federal Constitution; yet it is equally well settled that this liberty is not absolute and extending to all contracts, and that a State may, without conflicting with the provisions of the Fourteenth Amendment, restrict in many respects the individual's power of contract."

In *Nebbia v. New York*, *supra*, it was said: "Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot

exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest."

In speaking of deprivation of freedom of contract, it was said in *West Coast Hotel Co. v. Parrish*, *supra*: "What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."

"This essential limitation of liberty in general governs freedom of contract in particular. More than twenty-five years ago we set forth the applicable principle in these words, after referring to the cases where the liberty guaranteed by the Fourteenth Amendment had been broadly described:

"'But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.' *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 567.

"This power under the Constitution to restrict freedom of contract has had many illustrations. That it may be exercised in the public interest with respect to contracts between employer and employee is undeniable." Many such

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illustrations are cited and discussed by the court in its opinion at page 393.

In *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 17 S. Ct. 718, 41 L. Ed. 1165, it was said: "But into all contracts, whether made between States and individuals, or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the preexisting and higher authority of the laws of nature, of nations or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all and need never, therefore, be carried into express stipulation, for this could add nothing to their force."

In that regard, *Home Bldg. & Loan Assn. v. Blaisdell*, *supra*, said: " * * * the State also continues to possess authority to safeguard the vital interests of its people. It does not matter that such legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect.' * * * Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worthwhile,—a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court."

In *Indiana ex rel. Anderson v. Brand*, 303 U. S. 95, 108, 58 S. Ct. 443, 82 L. Ed. 685, 113 A. L. R. 1482, it was said: "Our decisions recognize that every contract is made subject to the implied condition that its fulfillment may be frustrated by a proper exercise of the police power * * *"

In *Union Dry Goods Co. v. Georgia Public Service Corporation*, 248 U. S. 372, 39 S. Ct. 117, 63 L. Ed. 309, 9 A. L. R. 1420, it was said: "That private contract rights must yield to the public welfare, where the latter is appropriately de-

clared and defined and the two conflict, has been often decided by this court."

In *Manigault v. Springs*, 199 U. S. 473, 26 S. Ct. 127, 50 L. Ed. 274, it was said: "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers * * * for the general good of the public, though contracts previously entered into by individuals may thereby be affected."

In *Atlantic Coast Line R. R. Co. v. City of Goldsboro*, 232 U. S. 548, 558, 34 S. Ct. 364, 58 L. Ed. 721, it was said: "* * * It is settled that neither the 'contract' clause nor the 'due process' clause has the effect of over-riding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise."

In the recent case of *East New York Savings Bank v. Hahn*, 326 U. S. 230, 66 S. Ct. 69, 90 L. Ed. 34, 160 A. L. R. 1279, it was said: "The formal mode of reasoning by means of which this 'protective power of the State,' * * * is acknowledged is of little moment. It may be treated as an implied condition of every contract and, as such, as much part of the contract as though it were written into it, whereby the State's exercise of its power enforces, and does not impair, a contract. A more candid statement is to recognize as was said in *Manigault v. Springs*, *supra*, that the power, 'which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the * * * general welfare of the people, and is paramount to any rights under contracts between individuals.' * * * Once we are in this domain of the reserve power of a State we must respect the 'wide discretion on the part of the legislature in determining what is and what is not necessary.' * * * So far as the constitutional issue is concerned, 'the power of the State when otherwise justified,' * * * is not diminished because a private contract may be affected."

In *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 28 S. Ct. 529, 52 L. Ed. 828, it was said: "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them."

It is evident that parties cannot lawfully deprive the state of its police power simply by making a contract between themselves. Since this power of the state to pass legislation which may affect existing contracts is implied in every contract drawn, then we must read the contract between plaintiff, Lincoln Federal Labor Union, and defendant, Northwestern Iron and Metal Company, as if it actually provided that it was subject to any legislation which the state might adopt under its police power. With such sovereign power implied in the contract, the amendment in question did not impair the existing provisions in their contract but was actually a part of it, and therefore not in violation of any provision of the Federal Constitution.

For the reasons heretofore stated, we conclude that the amendment is a reasonable, proper, and valid exercise of the police power of the state. As such, it is not in conflict with or repugnant to any federal law, but integrated therewith, and does not violate any provision of the Constitution of the United States, but on the contrary guarantees all those rights to all persons whomsoever within this state, whether employers or employees, union members, or non-union members.

Therefore, the judgment of the trial court should be and hereby is affirmed.

Affirmed.

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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1948
No. 47

LINCOLN FEDERAL LABOR UNION #19129, AMERICAN
FEDERATION OF LABOR, NEBRASKA STATE
FEDERATION OF LABOR, ET AL., APPELLANTS,

V.

NORTHWESTERN IRON AND METAL COMPANY,
DAN GIEBELHOUSE, STATE OF NEBRASKA, AND
NEBRASKA SMALL BUSINESS MEN'S ASSOCIATION,
APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE STATE OF
NEBRASKA.

BRIEF OF APPELLEES, STATE OF NEBRASKA AND
NEBRASKA SMALL BUSINESS MEN'S
ASSOCIATION.

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OPINION OF COURT BELOW.

The opinion of the Supreme Court of Nebraska in this case (R. 53) is reported at 149 Neb. 507, 31 N. W. (2d) 477.

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED.

The appellants have invoked the jurisdiction of this court under Section 237 (a) of the Judicial Code as amended, 28 U. S. C. A. 344 (a), this being a case where there is drawn in question the validity of a statute (constitutional amendment) of a state on the ground of its being repugnant to the Constitution of the United States and the decision was in favor of its validity.

Although counsel for appellees considered filing a statement against jurisdiction on the ground that the contentions of appellants are so unsubstantial that they do not merit consideration by this court, they decided not to file such a statement against jurisdiction because this court had accepted jurisdiction in the similar case of *Whitaker, et al. v. North Carolina*, notwithstanding the statement against jurisdiction filed by the Attorney General of North Carolina. On May 24, 1948, this court noted probable jurisdiction (R. 86).

STATUTE INVOLVED.

The Nebraska Right-to-Work Amendment became effective December 12, 1946; and is incorporated in the Nebraska Constitution as Sections 13, 14 and 15 of Article XV. It reads as follows:

"Section 1.

"No person shall be denied employment because of membership in or affiliation with, or resignation or expulsion from a labor organization or because of refusal to join or affiliate with a labor organization; nor shall any individual or corporation or association of any kind enter into any contract, written or oral, to exclude persons from employment because of membership in or non-membership in a labor organization.

"Section 2.

"The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, which exists for the purpose, in whole or in part, of dealing with employers concerning grievances; labor disputes, wages, rates of pay, hours of employment, or conditions of work.

"Section 3.

"This article is self-executing and shall supersede all provisions in conflict therewith; legislation may be enacted to facilitate its operation but no law shall limit or restrict the provisions hereof."

STATEMENT OF THE CASE.

On February 19, 1947, the plaintiffs (appellants), Lincoln Federal Labor Union No. 19129, American Federation of Labor, Nebraska State Federation of Labor, and Henry Reichel, individually and as president of said Lincoln Federal Labor Union No. 19129, filed their petition (R. 1) in the District Court of Lancaster County, Nebraska, against the defendants, Northwestern Iron and Metal Company, a Corporation, Dan Giebelhouse, and State of Nebraska. Over the objections of defend-

ants Northwestern Iron and Metal Company and Dan Giebelhouse, the Nebraska Small Business Men's Association was permitted to intervene as a defendant (R. 39, 38). The defendants are appellees here.

The petition alleges (R. 9) that the defendant Northwestern Iron and Metal Company and the plaintiff Lincoln Federal Labor Union entered into a collective bargaining contract, paragraph 3 of which provides in part as follows (R. 9, 33):

"Whenever any employee shall cease to be a member in good standing with the Union and when the Union shall have given written notice to the Company to that effect, the Company agrees to discharge said employee from its service at the end of the work week in which said notice of failure to maintain good standing in the Union is received."

that the defendant Dan Giebelhouse became delinquent in the payment of his dues and was suspended and ceased to be a member in good standing in the union; that (R. 10) the union gave the employer the required notice to discharge Giebelhouse but the employer refused to do so and repudiated Section 3 of its contract and asserted that it was illegal and void under the provisions of the Nebraska Right-to-Work Amendment referred to as the Anti-Closed-Shop Amendment, which was adopted by vote of the people of Nebraska on November 5, 1946, and became effective December 12, 1946 (R. 16). The provisions of the amendment are set up in the petition (R. 15).

The petition alleges (R. 16) that the amendment is void because in conflict with the Constitution of the United States.

The petition prays (R. 20) for a declaratory judgment that the collective bargaining agreement including paragraph 3 is valid and enforceable; that the Right-to-Work Amendment is unconstitutional and void; that the Northwestern Iron and Metal Company be ordered to perform the contract and to discharge Dan Giebelhouse, and be enjoined from continuing him in its employ.

The State of Nebraska filed a demurrer to the petition (R. 40), and the other defendants filed motions for judgment on the pleadings (R. 40,41), which, on July 7, 1947, the district court sustained, and entered its declaratory judgment (R. 44) holding that the Right-to-Work Amendment (now designated as Sections 13, 14 and 15 of Article XV of the Constitution of the State of Nebraska) is in all respects valid; that the union shop provisions of the collective bargaining agreement had been void and unenforceable since December 12, 1947; that Northwestern's refusal to discharge Giebelhouse was lawful and proper, and compliance with the union's demands for discharge would have been unlawful. The court further found that the terms of the amendment were no broader than necessary to carry out its objective, that the particular phase of employer-employee relations covered by said amendment has a definite relationship to the public welfare, and is subject to the police power of the state; that said amendment is not unreasonable, arbitrary or capricious; that the means selected have a real and substantial relation to the object sought to be attained by said amendment.

From this declaratory judgment and the order overruling the motion for new trial (R. 49) the plaintiffs appealed to the Supreme Court of Nebraska, which

affirmed the judgment on March 19, 1948 (R. 52), and filed a carefully considered opinion (R. 53-78), concluding that (R. 78) "the amendment is a reasonable, proper, and valid exercise of the police power of the state. As such, it is not in conflict with or repugnant to any federal law, but integrated therewith, and does not violate any provision of the Constitution of the United States, but on the contrary guarantees all those rights to all persons whomsoever within this state, whether employers or employees, union members or non-union members."

From this judgment the plaintiffs have appealed to this court.

SUMMARY OF ARGUMENT.

The Nebraska Right-to-Work Amendment makes it unlawful to deny employment to any person because of his membership or non-membership in a labor organization.

Since appellants' attacks upon the Right-to-Work Amendment resolve themselves largely to a contention that it is not a lawful exercise of the police power of the state, we shall first consider the police power, and the functions of the legislative and judicial branches of the government in connection with its exercise. Then, in the light of facts judicially known to the courts, we shall discuss the objects of the Right-to-Work Amendment, and the relation of the legislation to the objects sought to be obtained. With that background, and after discussing the nature and effect of motions for judgment on the pleadings and demurrers, from the sustaining of which this appeal was taken, we shall examine the allegations

of plaintiffs' petition and discuss separately appellants' assignments of error.

The police power is the power of the state to promote order, safety, health, morals, and the general welfare. Employment contracts are subject to regulation by the police power. An act of legislation has the support of the presumption that it is an exercise in the interest of the public. The burden is on him who attacks the legislation. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. Due process demands only that the law shall not be unreasonable, arbitrary, or capricious and that the means selected shall have a real and substantial relation to the objects sought to be attained. The function of the court is "only to determine whether it is possible to say that the legislative decision is without rational basis."

The primary object sought to be attained by right-to-work legislation is the guaranty to the individual human being that his right to work for a living in the common occupations of the community, which this Court has said is of the essence of personal freedom, is protected from both labor union leaders and employers who might attempt to deprive him of that right, either because he is or is not a member of a labor union. Objects secondary to the protection of this personal freedom are:

- (1) Elimination of strikes caused to force employers into compulsory union membership contracts.

- (2) Equalizing bargaining power between employers and employees' bargaining agents and thus

checking the tendency toward featherbedding, union encroachment on management functions, etc.

(3) Promotion of business efficiency.

(4) Protection of employers against being arbitrarily put out of business by use by union leaders of compulsory membership contracts and secondary boycotts.

(5) Protection of employers from being forced into monopolies and combinations in restraint of trade by union leaders using the weapons of compulsory union membership and secondary boycotts.

(6) Protection of the democratic processes in the unions themselves against the tendency to dictatorial leadership fostered by compulsory membership contracts which deter criticism of and opposition to existing leadership by threat of expulsion from the union with resulting loss of the right to work.

(7) Protection of individual workers, unions, employers and the public from the results of strikes, monopolies, featherbedding, racketeering and abuses and injustices fostered by compulsory union membership contracts.

That these are legitimate objects is evident without discussion. Their accomplishment would promote order, safety, health, morals and general welfare.

That the legislation has a real and substantial relation to the objects sought to be attained appears equally evident. Although the court will not judge of the adequacy or practicability of the law to forward its objects, it seems clear that the Right-to-Work Amendment will very defi-

nitely tend to accomplish its objects. It cannot be said that the legislative decision is without rational basis.

We turn to the appellants' petition to see by what allegations they seek to sustain the burden of showing that the Right-to-Work Amendment has no substantial relation to the objects sought to be attained.

Since the decree was entered pursuant to a demurrer and motions for judgment on the pleadings, the facts well pleaded in the petition will be considered as admitted, but not conclusions, inferences, opinions, predictions, arguments or allegations contrary to facts of which judicial notice is taken, or which are contrary to law. The twenty page petition of appellants contains no facts supporting their contentions of unconstitutionality. It is largely unsupported conclusions, opinions, predictions and arguments, and these are contrary to those which logically follow from the facts of which courts take judicial notice.

The substance of the petition is appellants' contention that compulsory union membership contracts are the only method unions have of obtaining an adequate share of the joint product of capital and labor, their conclusion that outlawing such contracts imperils the very existence of labor organizations, and their prediction that the right-to-work legislation will finish the unions as effective collective bargaining agencies. No facts alleged support such conclusions and predictions and they are contrary to facts which courts judicially notice, such as the existence and increase in strength of the powerful railway labor unions under a federal law that outlaws compulsory union membership contracts for railway labor.

Appellants' four assignments of error may be summarized as contentions that the Right-to-Work Amendment is invalid (1) because it deprives them, without due process of law, of liberty to make compulsory union membership contracts with employers, (2) because it impairs the obligations of such contracts which were in existence when the amendment became effective, (3) because, they say, it gives non-union workers protection and therefore deprives the unions and their members of the equal protection of the law, and (4) because the amendment prevents the unions from adequately functioning and thereby deprives them of their constitutional right of free speech and peaceable assembly.

We take these up in reverse order and begin by discussing free speech and assembly. In the first place, the Right-to-Work Amendment does not disable unions from adequately functioning. Even where the union is not entitled to exclusive bargaining rights under the federal law because the business involved does not affect interstate commerce, a rare case and not the case at bar, compulsory union membership is not indispensable to unions. Secondly, even if the Right-to-Work Amendment would render unions ineffective to accomplish their avowed purposes, it would still not be repugnant to the First Amendment, for it is absurd to contend that the rights of free speech or peaceable assembly carry with them a guarantee that the speech or assembly shall be successful in accomplishing its objectives. The protection of the First Amendment does not even extend to speech when the speech becomes coercive. *A fortiori*, no right to coerce men into union membership could possibly be added to the right of free speech or assembly as a concomitant thereof.

The third assignment of error—the claim that the unions are denied the equal protection of the laws—may have more semblance of merit when applied to right-to-work legislation from some state other than Nebraska, for the Nebraska amendment is as much anti-yellow dog as it is anti-closed shop. It protects both the union and the non-union man from denial of employment because of membership or non-membership in a labor organization.

The second assignment of error, contending that the right-to-work legislation impairs the obligation of contracts, is disposed of by what has been said about the police power, and by the well established rule that “every contract is made subject to the implied condition that its fulfillment may be frustrated by a proper exercise of the police power.”

In their first assignment of error appellants contend that the court erred in failing to hold that the Right-to-Work Amendment deprived the unions of liberty without due process, particularly in failing to hold that prohibition of compulsory union membership contracts is arbitrary, unreasonable, excessive and without rational basis. Under this assignment of error, appellants argue that there should be regulation to stop the evils the Right-to-Work Amendment is designed to correct, but there should not be complete prohibition of compulsory union membership. They argue with tongue in cheek, for when regulation is imposed, they are as vehement in denouncing it and as vigorous in fighting it as they are in opposing the right-to-work legislation. The state may prohibit if deemed necessary for the promotion of the general welfare. Actually, every regulation involves some pro-

hibition. This is a regulation of collective bargaining and of unions and of employers by prohibiting a noxious incident of labor-management relations. The people of Nebraska decided that this simple, easily understood regulation was preferable to voting the establishment of a system of supervising union initiation fees, dues, assessments, work permits, membership requirements, grounds for expulsion, and collective bargaining demands. Regulation of all of these matters, and the tendency to state control of labor unions which such regulations would entail are made unnecessary by the Right-to-Work Amendment. It gives freedom to the individual worker, and also allows the union to remain free from state control and master its own internal affairs.

ARGUMENT.

I.

THE POLICE POWER.

A. Definition.

In *Home Building & Loan Association v. Blaisdell*, 290 U. S. 398, 78 L. Ed. 413, 54 S. Ct. 231, 88 A. L. R. 1481, the court said:

"The police power is an exercise of the sovereign right of the government to protect the lives, health, morals comfort and general welfare of the people."

The court below, in its opinion, adopted a substantially identical definition of the police power from 16 C. J. S. Constitutional Law, Section 174, page 537, as follows:

"Police power is the exercise of the sovereign right of a government to promote order, safety, health, morals, and the general welfare of society."

In *The Supreme Court in United States History* by Charles Warren, (Revised Edition, Little, Brown & Company 1935) Vol. 2 at page 744, it is said:

"When, in the last decade of the nineteenth century, it [the United States Supreme Court] took the radical step of expanding the old classic phrase defining the objects of the exercise of the police power—'public health, safety and morals'—by interpolating the words 'public welfare', it advanced far towards acceptance of the theory of modern sociological jurists that the law must recognize the priority of social interests."

B. Employment Contracts and Labor-Management Relations Are Subject to the Police Power.

In the opinion of the court below (R. 67 ff) are quotations from a number of decisions of this court supporting the above proposition. We deem it unnecessary to repeat them here.

We would like, however, to quote from *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 81 L. Ed. 703, 57 S. Ct. 578, 108 A. L. R. 1330 (1937), the following:

"This power under the Constitution to restrict freedom of contract has had many illustrations. That it may be exercised in the public interest with respect to contracts between employer and employee is undeniable. Thus statutes have been sustained limiting employment in underground mines and smelters to eight hours a day (*Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780; 18 S. Ct. 383); in requiring redemption in cash of store orders or other evidences of indebtedness issued in the payment of wages (*Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 46 L. Ed. 55, 22 S. Ct. 1); in forbidding the payment

of seamen's wages in advance (*Patterson v. The Eudora*, 190 U. S. 169, 47 L. Ed. 1002, 23 S. Ct. 321); in making it unlawful to contract to pay miners employed at quantity rates upon the basis of screened coal instead of the weight of the coal as originally produced in the mine (*McLean v. Arkansas*, 211 U. S. 539, 53 L. Ed. 315, 29 S. Ct. 206); in prohibiting contracts limiting liability for injuries to employees (*Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 55 L. Ed. 328, 31 S. Ct. 259, *supra*); in limiting hours of work of employees in manufacturing establishments (*Bunting v. Oregon*, 243 U. S. 426, 61 L. Ed. 830, 37 S. Ct. 435, *Ann. Cas.* 1918A, 1043); and in maintaining workmen's compensation laws (*New York C. R. Co. v. White*, 243 U. S. 188, 61 L. Ed. 667, 37 S. Ct. 247, *L. R. A.* 1917D, 1; *Mountain Timber Co. v. Washington*, 243 U. S. 219, 61 L. Ed. 685, 37 S. Ct. 260, 13 N. C. C. A. 927, *Ann. Cas.* 1917D, 642). In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. *Chicago, B. & Q. R. Co. v. McGuire*, *supra* (219 U. S. p. 570, 55 L. Ed. 339, 31 S. Ct. 259)."

The Federal Fair Labor Standards Act, 29 U. S. C. A., Sections 201-219, was enacted in 1938 limiting the liberty of employees and employers to contract with reference to wages and hours, and its validity with reference to the due process clause was sustained on the authority of the *Parrish* case, in *U. S. v. Darby*, 312 U. S. 100, 657, 85 L. Ed. 609, 61 S. Ct. 451, 132 A. L. R. 1430.

The National Labor Relations Act, which outlawed the yellow dog contract and would have outlawed the closed shop, except for a proviso, was enacted in 1935. Its constitutionality was sustained in *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U. S. 1, 81 L. Ed. 893, 57 S. Ct. 615, 108 A. L. R. 1352 (1937).

The provision of the National Labor Relations Act that it "shall be an unfair labor practice for an employer * * * by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization," was upheld in *Phelps Dodge Corporation v. National Labor Relations Board*, 333 U. S. 177, 61 S. Ct. 845, 85 L. Ed. 1271, 133 A. L. R. 1217 (1941). The court there said:

"The course of decisions in this Court since *Adair v. United States*, 208 U. S. 161, 52 L. Ed. 436, 28 S. Ct. 277, 13 Ann. Cas. 764, and *Coppage v. Kansas*, 236 U. S. 1, 59 L. Ed. 441, 35 S. Ct. 240, L. R. A. 1915C 960, have completely sapped those cases of their authority."

So the field of contracts of employment is clearly subject to the police power of the state.

As to regulation of labor unions in general, this court said in *Thomas v. Collins*, 323 U. S. 516, 532, 65 S. Ct. 315, 89 L. Ed. 430:

"That the State has power to regulate labor unions with a view to protecting the public interest is * * * hardly to be doubted. They cannot claim special immunity from regulation."

{ We feel it unnecessary to multiply citations to the same effect.

C. Legislation is Presumed to be in the Public Interest.

In *Erie Railroad Company v. Williams*, 233 U. S. 685, 58 L. Ed. 1155 (1914), where this court sustained New York legislation requiring railroads to pay their employees semi-monthly rather than monthly, (it is stated in the opinion:

"Each act of legislation has the support of the presumption that it is an exercise in the interest of the public. The burden is on him who attacks the legislation, and it is not sustained by declaring a liberty of contract. It can only be sustained by demonstrating that it conflicts with some constitutional restraint, or that the public welfare is not subserved by the legislation. The legislature is, in the first instance, the judge of what is necessary for the public welfare, and a judicial review of its judgment is limited. The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance."

D. The Function of the Court.

1. THE FUNCTION OF THE COURT IS ONLY TO DETERMINE WHETHER IT IS POSSIBLE TO SAY THAT THE LEGISLATIVE DECISION IS WITHOUT RATIONAL BASIS.

We quote again from *West Coast Hotel Company v. Parrish*, 300 U. S. 379, 81 L. Ed. 703, 57 S. Ct. 578, 198 A. L. R. 1330 (1937):

"In *O'Gorman & Young v. Hartford F. Ins. Co.*, 282 U. S. 251, 75 L. Ed. 324, 51 S. Ct. 130, 72 A. L. R. 1163, which upheld an act regulating the commissions of insurance agents, we pointed to the presumption of the constitutionality of a statute dealing with a subject within the scope of the police power and to the absence of any factual foundation

of record for deciding that the limits of power had been transcended. In *Nebbia v. New York*, 291 U. S. 502, 78 L. Ed. 940, 54 S. Ct. 505, 89 A. L. R. 1469, dealing with the New York statute providing for minimum prices for milk, the general subject of the regulation of the use of private property and of the making of private contracts received an exhaustive examination and we again declared that if such 'laws have a reasonable relation to a proper legislative purpose and are neither arbitrary nor discriminatory, the requirements of due process are satisfied'; that 'with the wisdom of' the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal'; that 'times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.'

In *Clark v. Paul Gray, Inc., et al.*, 306 U. S. 583, 83 L. Ed. 1001 (1939), in which this court held valid a California statute putting a license tax of \$7.50 per car on bringing automobiles into the state in caravans for resale, it is stated in the opinion:

"The determination of the legislature is presumed to be supported by facts known to it unless facts judicially known or proved preclude that possibility. * * * it is not the province of a court to hear and examine evidence for the purpose of deciding again a question which the legislature has already decided. Its function is only to determine whether it is possible to say that the legislative decision is without rational basis. * * * The legislature must be assumed to have acted on information available to courts, and

where * * * the evidence * * * shows that it is at least a debatable question * * * decision is for the legislature and not the courts."

2. FACTUAL STUDY—JUDICIAL NOTICE.

The parties to this litigation are agreed that in determining the question of whether it is possible to say that the legislative decision is without rational basis—that the object of the legislation is demonstrably not in the interest of the public or that the legislation has no reasonable relation to its object—the court may take judicial notice of the facts and circumstances bearing upon the question. In the appellants' brief reference is made to the brief of Louis D. Brandeis, filed in *Muller v. Oregon*, 208 U. S. 412, to a number of law review articles on the subject, and to the dissenting opinions of Justice Brandeis in a number of cases. In one of these, *Truax v. Corrigan*, 257 U. S. 312, at 356, he said:

"Whether a law enacted in the exercise of the police power is justly subject to the charge of being unreasonable or arbitrary, can ordinarily be determined only by a consideration of the contemporary conditions, social, industrial and political, of the community to be affected thereby. Resort to such facts is necessary, among other things, in order to appreciate the evils sought to be remedied and the possible effects of the remedy proposed. Nearly all legislation involves a weighing of public needs as against private desires; and likewise a weighing of relative social values."

In *N. L. R. B. v. Jones and Laughlin Steel Corp.*, 301 U. S. 1, 81 L. Ed. 893, 57 S. Ct. 615, 108 A. L. R. 1352 (1937), the court took judicial notice of certain matters

in connection with a labor problem attempted to be solved by legislation, the constitutionality of which was questioned before it, and the court referred for such judicial notice to opinions of courts and to reports of governmental commissions and bureaus and congressional committees. In view of what appears to be the now well established practice of this court, and the practice of both appellants and appellees in this case, we take no further space to discuss this matter. Appellants present their separate so-called economic brief. We include the facts and law citations under one cover.

II.

OBJECTS OF THE RIGHT-TO-WORK AMENDMENT AND ITS TENDENCY TO ACCOMPLISH THEM.

A. The Primary Object—The Primary Object Sought To Be Attained by the Right-to-Work Legislation is the Guarantee to the Individual Human Being That His Right to Work For His Living in the Common Occupations of the Community, Which This Court Has Said is of the Essence of Personal Freedom, is Protected From Both Labor Union Leaders and Employers Who Might Attempt to Deprive Him of That Right, Either Because He Is Or Is Not A Member of A Labor Union.

Is this "right to work" something which may be protected? In *Truax v. Raich*, 239 U. S. 33, 60 L. Ed. 131 (1915), this court held void an Arizona statute requiring employers of five or more persons to employ eighty per cent United States citizens. The court held that the law denied equal protection to aliens, and was not justified as a proper exercise of the police power. The court said:

"It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the ~~purpose~~ purpose of the [14th] Amendment to secure."

In *Meyer v. Nebraska*, 262 U. S. 390, at 399, 67 L. Ed. 1042, at 1045, this court said:

"The problem for our determination is whether the statute, as construed and applied, unreasonably infringes the liberty guaranteed to the plaintiff in error by the 14th Amendment. 'No state * * * shall deprive any person of life, liberty or property without due process of law.'

"While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, * * *." (Citing many cases.)

Strangely enough, the court which said the state could not take away the right to work, is now asked to say that the state cannot protect the right to work.

Does the "right to work" need protection?

"For the last 14 years, as a result of labor laws ill-conceived and disastrously executed, the American working man has been deprived of his dignity as an individual. He has been cajoled, coerced, intimidated, and on many occasions beaten up, in the name of the splendid aims set forth in section 1 of the National Labor Relations Act. His whole economic life has been subject to the complete domination and control of unregulated monopolists. He has

on many occasions had to pay them tribute to get a job. He has been forced into labor organizations against his will. At other times when he has desired to join a particular labor organization he has been prevented from doing so and forced to join another one. He has been compelled to contribute to causes and candidates for public office to which he was opposed. He has been prohibited from expressing his own mind on public issues. He has been denied any voice in arranging the terms of his own employment. He has frequently against his will been called out on strikes which have resulted in wage losses representing years of his savings. In many cases his economic life has been ruled by Communists and other subversive influences. In short, his mind, his soul, and his very life have been subject to a tyranny more despotic than one could think possible in a free country."

The foregoing is no mere contention of ours. It is the finding made April 11, 1947, by the House of Representatives Committee on Education and Labor, in reporting out the Labor-Management Relations Act of 1947. Obviously, the situation there reported was due largely to the despotic power obtained by union leaders through compulsory union membership contracts which made the working man's right to work depend on his obtaining and maintaining membership in good standing in a certain labor union, which contracts in large part were imposed upon workers and management with the help of one-sided labor legislation and the necessity of appeasing the labor bosses to obtain production during the recent war years.

This was the situation which existed on November 5, 1946, when the people of the State of Nebraska by a sub-

stantial majority adopted the Right-to-Work or so-called Anti-Closed Shop Amendment to the State Constitution which outlaws such compulsory union membership contracts. Many other states did likewise by statute or constitutional amendment, and on June 23, 1947, the United States Congress passed, over the president's veto, the Labor-Management Relations Act of 1947, which in Section 8 (A) (III) outlaws compulsory union membership agreements, except that if a majority of his employees favor such a contract, an employer may agree with a union (which has met all of the requirements of the law by filing financial statements, etc.) that he will discharge a worker who, after 30 days employment, is not in good standing with the union because of failure to tender periodic dues or initiation fees uniformly imposed.

ADMISSIONS TO AND EXPULSIONS FROM UNIONS:

As a matter of elaborating upon the above quoted findings of the Congressional Committee, let us consider the matter of admissions to and expulsions from labor unions. With reference to this matter, we refer the court to the following excerpt from the book, "American Labor Unions," by Florence Peterson, Director Industrial Relations Division, Bureau of Labor Statistics, U. S. Department of Labor, Harper & Brothers, 1945. This book is written by a government official, very sympathetic with unions, and is made up from official sources. It is pointed out that the constitutions of a number of unions have provisions under which a member may be expelled who openly voices dissatisfaction, or who seeks to solicit votes for a change in union program or officers. We quote the following from page 103:

"While expulsion for causes other than non-payment of dues is infrequent, it nevertheless is a seri-

ous matter and may prove a hardship in individual cases. This is especially true where unions have closed or union-shop agreements with most or all employers in the industry or locality, in which case expulsion from the union is tantamount to depriving a member of employment within his trade.

"Unions naturally consider those actions by individuals or groups which jeopardize the existence or prestige of the union to be the most serious offenses, such as instigating internal factional disruption, promoting or aiding a rival union, or going to court about internal union matters.

"Although some union constitutions do not specify particular causes for expulsion, all of them carefully outline the procedure to be used when charges are brought against a member. In many constitutions the grounds for expulsion are described in such general terms as 'violation of union rules' or 'continued offense against the union.'

"In contrast are the provisions in a number of constitutions which itemize numerous causes for expulsion which, if enforced, might result in the expulsion of a member who openly voiced dissatisfaction or who sought to solicit votes for a change in union program or officers. Such potential infringements on members' freedom of speech generally turn on such clauses as 'making untruthful statements,' 'impugning the motives of officers,' 'misrepresenting the union and its officers.' The distinction between allowable and forbidden activities in connection with members' efforts to bring about changes in union government and program hinges on what constitutes 'attempts to create dissension among members,' 'advocating or attempting to bring about a withdrawal of any member or group of members,' 'working in

the interests of any cause which is detrimental to the union,' 'hampering any local or National officer.'

"The constitution of the International Brotherhood of Electrical Workers (AFL) includes the following among the offenses for which members may be fined or expelled: advocating or attempting to bring about a withdrawal of any local union or any member or group of members; sending letters or statements, anonymous or otherwise, or making oral statements to public officials or others which contain untruths about or which misrepresent the union, its officers or representatives; creating or attempting to create dissatisfaction or dissension among any of the members; working in the interest of any organization or cause which is detrimental to or opposed to the union; mailing, handing out or posting cards, handbills, letters, marked ballots or political literature of any kind, or being a party in any way to such being done in an effort to induce members to vote for or against any candidate or candidates for office in a local union, or candidates to conventions. (Article XXVII)"

* * *

"In most cases a member who is expelled from one local may not be admitted by another without the approval of the first local, and some unions also require the approval of the International Executive Board. A few unions put a time limit of six months or a year before any expelled member may rejoin; in all cases, of course, the expelled member must pay all outstanding fines as well as the usual, or sometimes a higher, rejoining fee."

The case of Cecil B. DeMille is well known. Here it is in his own words from the statement he delivered before the House of Representatives Committee on Education and Labor on February 21, 1947:

"I am a member of the Screen Directors Guild. I am a member of the American Federation of Radio Artists (known as AFRA). I have been a member of AFRA since it was organized. Under AFRA's union shop contract with the radio industry, every radio artist is obliged to join the union in order to work at his profession. In 1944, my local AFRA levied upon all its members an assessment of one

dollar, to finance a campaign against a proposition appearing on the California ballot at the general election of that year. I personally favored the proposition. I refused to pay a dollar to oppose my own convictions as a citizen. For this adherence to my political right, I was suspended by AFRA—and, under the provision of the union shop, prevented from appearing on the radio program which I had produced for more than eight years.

"My union, the American Federation of Radio Artists, is an example of a labor monopoly. It has an industry-wide contract, under which no one can work as a radio artist unless he joins AFRA and keeps in good standing with the union. I cannot work as a radio artist anywhere in the United States where AFRA's contract is in force because I refused to pay a political assessment. When a man's right to work depends upon his submitting to such an imposition, the union's monopolistic power is too apparent to require further proof."

Mr. DeMille had many more worth-while comments on compulsory unionism. We quote again from his statement:

"There is no right more fundamental than the right of the human being to work. It is by work that men live.

* * *

"Wherever the closed shop prevails, if a union member is expelled or suspended by his union, he loses his right to work in that shop. In an industry-wide closed shop, he loses his right to work in that industry. In a completely unionized society, under a universal closed shop, expulsion from a union would mean complete and absolute loss of the right to work. The leader of the current Hollywood strike was not exaggerating when he said, 'We contemplate

putting out a bill so everybody in the county has to join a union, and you will be in a bad fix when it comes to that.' (Deposition of Herbert Sorrell, taken by Wesley Cupp, attorney, quoted by Mr. Cupp over radio station KFAC, Los Angeles, March 25, 1945.)

"Millions of Americans are in that 'bad fix' right now—wherever a closed shop contract renders their right to work dependent on keeping in the good graces of a union, which often means a union boss.

"A closed shop union, able to deprive a man of the right to work, is in a sense more powerful than government itself. The government does not claim the power to take away a man's right to work, unless he has been convicted of crime, after fair trial and due process of law. When the government puts a man in prison, it assumes the responsibility for keeping him alive, at least, with food and medical care—as well as shelter! A closed shop union takes no such responsibility for a member who has incurred its displeasure. As far as the union is concerned, he is left with the right to starve."

Mr. DeMille proceeded to point out that there were a number of rights of the individual guaranteed to him by the Constitution of the United States from government interference that the union leaders could override because of their power to take away the individual's right to work.

One of these is the right to religious freedom. On this point Mr. DeMille said:

"No freedom is more precious to us than religious freedom—but I have seen a copy of a letter from a union officer to an official of a church, some of whose members had refused to join the union because, they said, it was contrary to their religious beliefs. • The

union officer wrote: "If we are compelled to enforce agreements and one of your people should take this stand, there is nothing else that we could do but insist on its enforcement"—which means that a man could not work if his religion forbids him to join a union. I am not at liberty to cite the names involved in this correspondence. Neither do I wish to discuss the tenets of any religious denomination. I quote only that one sentence from the union officer's letter, to show that at least one union is prepared to override religious freedom in order to compel men to join the union—and the closed shop gives the union the power to carry out its threat."

In his testimony before the United States Senate Committee on Labor and Public Welfare, February 5, 1947, C. E. Wilson, president of General Motors, discussed the maintenance of membership provision which it was forced by the War Labor Board to incorporate in its agreement with the union. He said:

"Under the 'maintenance of membership' provision employees represented by the union for the purpose of collective bargaining could be discharged at the union's request if they failed to maintain their membership in good standing. A number of examples could be given. The following statements from employees who were being discharged under this provision will be of interest:

"Of course I will not go up to the hall on meeting nights. The one reason I don't pay February, I believe in buying an office for doing the business of a group of men who have a difference of mind between union and company. I believe in bargaining agencies to the extent of right, but I don't believe in buying a place where there's a bar. Now that this, where there is a bar and beer and card table and I do not believe in helping buy them. You have taken some

of my money since I belonged and maybe some of my money has gone into that, maybe \$12 will go into that. Any den of iniquity where there is beer and whisky sold I don't want to be in. I used to be a drinker and I played some cards, but now I live in the Gospel of Jesus Christ. As far as your business part is concerned, I believe that differences between the company and the union should be thrashed out, like the church that has seven members—they thrash out how much to give the janitor and other things like that. I believe in that because the Bible tells you how to thrash out those things. That is all right, that is what I believe in the Word of God.'

"Another example:

"I am a minister of the Gospel and I preach against beer, whisky, dancing, card playing and gambling. Therefore, I can't support the union. I don't belong to any lodges because of that, so that is my standing. You can do just as you please. I have already settled it in my own heart. As far as they are concerned they can do just as they please, but I will not pay no more into the union. I am not mad at anybody, but I cannot support an organization like that.'"

A second important freedom is freedom of speech. On this, in the above cited statement, Mr. DeMille said:

"Congress is forbidden by the same Amendment to abridge 'the freedom of speech * * * or the right of the people peaceably to assemble.' But in some unions no member dares to speak out or to combine with his fellow-members against the entrenched power of the union boss or so-called union majority. It would make this brief far from brief if I attempted to list all the cases of infringement of speech by closed shop unions that have come to my attention.

I will cite only one case, mentioned by the Senator from Minnesota, Mr. Ball, in a recent article: 'A wireless telegrapher with a family to support was expelled from a union and lost his job merely because he spoke up in meeting against Communist Leadership.' " (Liberty, Jan. 18, 1947, p. 54.)

But we will not stop with Mr. DeMille. We will cite a few more illustrative cases.

"An illuminating case in point is provided by the United Mine Workers, whose leader John L. Lewis has graciously given the country a 3½ month reprieve from 'the hysteria and frenzy of an economic crisis,' as he himself termed it. During that latest crisis the dispatches from the soft coal fields reported that the miners were standing behind John L. Lewis almost to a man. And the implication usually was that the driving forces of the strike were loyalty to Lewis and the prospect of economic gain.

"Underlying that performance, however, and basic to it was an agreement in the soft coal fields providing that 'as a condition of employment all employees shall be members of the United Mine Workers.' Hence, to hold a job in 90% of the soft coal industry which is governed by contracts with the United Mine Workers, a miner must not offend the union. To avoid offense the union member must even be careful in criticizing what his union does. Suspension from the union for six months and hence from the right to hold a job is the penalty imposed by the United Mine Workers' constitution for circulating a statement 'wrongfully condemning any decision rendered by any officer of the organization.'

"The Closed Shop—Key to Labor Monopoly"—

N. Y. Herald Tribune, Jan. 7, 1947.

"According to its official publication, it (The United Mine Workers with a closed shop contract)

disciplined in one year 4,031 members by expelling them for a total of 150,171 years and by fining them a total of \$387,205—an average expulsion period of 35 years per man and an average fine of over \$95 per man. Now what becomes of those 4,031 outcasts during these thirty-five years of treatment as commercial lepers?"

Walter Gordon^{*} Merritt on America's Town Meeting of the Air, March 23, 1942.

"Two men—let's call them Smith and Black—dropped into the Department of Justice the other day. They had been members of a union in Chicago. Dissatisfied with the management, they had made a protest. The management took away their union cards. This was a catastrophe because the union's old age benefit fund made a membership worth about \$5,000. Smith and Black went into court and got an injunction. The union fought the injunction, and during the ensuing litigation Smith and Black went broke. So they gave up their retirement funds and moved to Washington, where, being good workmen, they soon got jobs. As soon as they were established, the Chicago union found out about it and told the Washington employer to fire them. He had to comply.

"Smith and Black are about 50 years old. They are skilled in their trade. But they can't work at that trade any longer. They are stunned and beaten men. It doesn't take many such examples to prove to the workman that he had better not protest too much against the actions of union management."

Thurman Arnold in "Labor's Hidden Holdup Men," Readers Digest, June, 1941.

"At General Machinery Corporation in Hamilton, Ohio, an employee saw another employee strike a foreman on duty and knock him to the floor. The

employee who was the witness testified in the Municipal Court of Hamilton, Ohio, in an assault and battery proceeding which followed the incident. He was sworn and told the truth. When the trial was ended, the union brought charges against the witness for conduct unbecoming a union member because he testified against a brother member in Court. The witness was ousted by the union and thereupon, the union demanded that the employer discharge the witness under the maintenance of membership clause in the contract because the witness was no longer a member in good standing, and the company was obliged to let the man go."

Statement of William L. McGrath, president of the Williamson Heater Co., Cincinnati, Ohio, made before the United States Senate Committee on Labor and Public Welfare, March 7, 1947.

On freedom of petition, DeMille said:

"The First Amendment further forbids Congress to abridge the people's right 'to petition the Government for redress of grievances.' But a Massachusetts teamster was expelled from his union because he appeared before a legislative committee on behalf of a bill that the union opposed."

DeMille's own case is a good illustration. He was denied the right to work in radio because of his refusal to contribute money to support a political campaign which he opposed.

On the due process clause, DeMille comments as follows:

"The Fifth Amendment states that, 'no person shall be * * * deprived of life, liberty or property, without due process of law.' For any union member

to appeal to the courts is practically equivalent to signing his death warrant as far as his union membership is concerned. In Hollywood, three members of one union were suspended for appealing to the courts against a political assessment—and two others were suspended because they spoke up in a union meeting in defense of the other three."

As to the adequacy of the remedy of appeal through union trial boards and conventions we again quote from DeMille:

"The union constitutions provide for appeals; from the local trial board all the way up to the national convention. The convention may be anywhere from one to five years from the time the member was expelled. How many wage-earners can wait that long without working?

"It is notorious that some union trials are a travesty of justice. It is not unknown that a man's very accusers are appointed to serve on the board that tries his case!

"The average union member cannot take his case to court. Most courts will insist that he first exhaust his remedies within the union—which may mean months or years of carrying a pre-judged case through the farcical mumbo-jumbo of appeals from one union body to another.

"But suppose he does exhaust his so-called remedies within the union and is still not satisfied that justice has been done him. He may then go to court—and face, with his meagre resources, the expensive talent of the union's legal department and the union's increased determination to make an example of him. Let us be realistic. How many workers—even if they were working steadily—could afford the long drawn-out litigation thus forced upon

him? How much less can a man afford it when he has been out of work for months or years.

"The average man has absolutely no available redress of wrongs done him by a closed shop union. The average union member, wronged by his union, has to battle with empty hands—with hands emptied when the union took away his right to work. What chance has he? To say that he has any chance is to deal in fictions as cruel as they are unreal.

"It is not surprising that men and women with no income but their wages, with families to support and educate, many with debts to pay, have submitted to wrongs imposed by closed shop unions rather than face the impossible task of seeking redress."

The following examples of expulsions from unions resulting in the loss of workman's job are included, although they do not fall into any of the foregoing categories:

"In a statement before the National War Labor Board on April 20, 1943, Mr. Prentiss gave specific examples of cases in which compulsory unionism severely limited the rights of an employee to work at his job. In one of the plants of the Armstrong Cork Co. the agreement contained a union-shop clause and a no-strike clause. Disregarding its contractual obligation, the union called a strike. Two of the employees, believing the strike to be unlawful (as it was), refused to join the picket line. Therefore, the union demanded that these two employees be discharged, and the company reluctantly complied. As Mr. Prentiss stated: 'May I ask the public members of the Board how they would feel if they were put in the position in which I was placed, of having to authorize the discharge of two efficient

workers who had done only what their consciences and their contract demanded.' ”

“Management at the Bargaining Table” by Hill and Hook, McGraw-Hill Book Co., 1945, p. 153.

“Walfred J. Stellberg, member of the AFL Milk Drivers Union in Duluth for fifteen years, was fined \$1500 by his union. He was unable or unwilling to pay the fine, and the union demanded his discharge. Why was this good union member fined? The reason is enlightening. His wife, Esther I. Stellberg, worked as a supervisor and department head in a department store. When the clerks of that department store struck in a dispute with their employer, Mrs. Stellberg continued to work, since she was not a member of the department store union and since she desired to protect the rights and privileges accruing to her as a result of 26 years service with the same employer. Mr. Stellberg was told by his union that his wife must refrain from working during the clerks' strike. Mr. Stellberg attempted to persuade his wife to stop work, but she had a mind of her own and continued working in the department store. It was for this heinous offense that Union Member Stellberg was fined \$1500 and the union demanded his discharge. Since the same union held closed shop contracts with other milk companies in Duluth, the action of the union prevented him from obtaining employment with any other milk company in the area. When Stellberg sued the union in court, the union withdrew its fine and suspension and settled the case out of court.”

Digested from Duluth Herald, 11/16/46.

Admission to membership in certain unions is often limited by the unions in such a way that very unfair restrictions are placed on the opportunity of workers to earn a living. Here are some illustrations:

"Then there is the exploitation of labor by labor. At Fort Meade the Steamfitters' Union admitted only six new members during the peak of construction; thus the favored few on the inside were able to work overtime at double pay, earning \$150 a week. The electricians, instead of admitting new members, levied a daily fee of \$1 or \$2 per man for a working permit. The carpenters went to the other extreme, taking into the union a mass of untrained and incompetent men bound to be discharged soon after paying their admission fees. The New York Times reports that the Union 'take' from this source was over \$400,000.

"Some unions have such high admission fees that it is almost impossible for the average man, no matter how well qualified, to join. The truckers in Seattle, for instance, charge \$500. The Motion Picture Union in Cleveland grabs \$1000. And the Glaziers' Union in Chicago demands a cool \$1500 for the right to work.

Thurman Arnold in "Labor's Hidden Holdup Men," Readers Digest, June, 1941.

"The AFL has a closed shop contract on the construction of a large power plant near St. Louis. Using this as a club it is requiring \$150 initiation fees from all skilled workers and \$50 from unskilled laborers. It is estimated that 5,000 workmen will be needed to rush the plant to completion. At an average take of \$100 apiece, the initiation take will amount to around \$500,000."

Drew Pearson and Robert Allen in Washington Merry-Go-Round, Dec. 31, 1940.

"Corwin D. Edwards, of the United States Department of Justice (in an address before the American Economic Association, December, 1941), cited the case of welders being forced to pay admission fees

and dues to nine separate AFL unions and gave an example of one welder who paid \$650 in one year to obtain the right to work.

"The hodcarriers' local in Baltimore increased its union treasury from \$2,590 to \$89,500 in a five-months period in the winter of 1940 and 1941 by selling work permits.

St. Louis Union Trust Company Letter, February, 1946.

"Perhaps the greatest menace to the public occurs when a closed shop is combined with a closed union. In such cases, membership is so restricted that the union in effect prevents anyone from entering the occupation. For instance, in New York City, a union of newspaper deliverymen provides that no one can become a member of the union unless he is the legitimate son of a member of the union! People are thus prevented from working at an available job even if they *want* to join the union."

From N. A. M. Industrial Relations Department pamphlet on "The Closed Shop."

These, of course, are mere examples. The necessity of keeping this brief within limits prevents an endless recitation of similar instances.

With the presumption that the legislation is an exercise in the interest of the public, reinforced with knowledge by the court, from Congressional Committee Reports and numerous other sources, of the evils which the Right-to-Work Amendment is designed to and obviously will correct, how can it be possible for any judge to say that the legislative decision is without rational basis?

But we have so far only discussed the primary object of the legislation.

B. Secondary Objects of Right-to-Work Amendment.

1. ELIMINATION OF STRIKES AND BOYCOTTS CALLED TO FORCE EMPLOYERS INTO COMPULSORY UNION MEMBERSHIP CONTRACTS.

While it is true that the publications of the Bureau of Labor Statistics do not show demands for compulsory membership contracts as the primary issue in a large proportion of strikes in recent years, nevertheless the number of strikes over that issue is very substantial. The numerous compulsory union membership contracts which have been signed were not agreed to by employers without strikes or threats of strikes. That is, of course, excepting such contracts as were forced on employers by the War Labor Board to prevent strikes during the war period. Because union leaders know that the public is not sympathetic with demands for compulsory union membership contracts, for public relations purposes, they are careful to announce that a strike is called to obtain better wages. They are reluctant to agree on the wage issue until the matter of compulsory union membership is first or simultaneously agreed upon.

The records of this court are not lacking for cases involving strikes for compulsory union membership contracts. *Apex Hosiery Company v. Leader*, 310 U. S. 469, 84 L. Ed. 1311, 60 S. Ct. 987, 128 A. L. R. 1044 (1940), is an illustrative case occurring after the National Labor Relations Act went into effect. Although only eight of the Apex Hosiery Company's twenty-five hundred employees were members of the union, the union demanded a closed shop, and on the refusal of the Company to grant it, union members from other factories in Phila-

delphia, acting under the direction of the union president, seized the Company's plant and held it for several weeks. Its equipment and machinery were wantonly demolished and damaged to the extent of many thousands of dollars. Concededly the purpose of the union and its principal objective was to compel the company to yield to its demand for a union shop. This court held that damages were not recoverable under the Federal Anti-Trust Acts.

Other illustrations of strikes for closed-shop contracts are found in *Hunt v. Crumboch*, 325 U. S. 821, 89 L. Ed. 1954, 65 S. Ct. 1545 (1945), and *Allen Bradley Co. v. Local Union No. 3*, 325 U. S. 797, 65 S. Ct. 1533, 89 L. Ed. 1939 (1945), of which more later in this brief.

The *Monthly Labor Review*, published by the United States Department of Labor, Bureau of Labor Statistics, in the May, 1948, issue at pages 480 and 481, reports:

"An 11-month stoppage of approximately 11,000 production workers of the West Allis, Wis., plant of the Allis-Chalmers Manufacturing Co. was terminated March 23, when the strikers voted by a ratio of 3 to 1 to accept an 18½-cent hourly wage increase. *The most controversial issues, however, remained unsolved—continuation of a union shop and revised grievance procedure.* The second and smaller stoppage, which had continued for nearly 15 months at the farm-equipment plant of J. I. Case Co. in Racine, Wis., was terminated March 9. This settlement provided for an 18-cent wage increase, but contained no provision for the closed shop or compulsory check-off, *the issues which had prolonged the dispute.*" (Emphasis ours.)

"The first large strike of 1947 and the first major telephone strike ever to occur in this country, began

April 7 when about 370,000 telephone workers walked out after weeks of fruitless negotiations. This strike continued well into May, thereby concentrating the year's peak of strike idleness in April and May. The principal unions involved, affiliates of the National Federation of Telephone Workers (Ind.), presented a generally uniform series of 10 demands to the various Bell System companies. In addition to wages, *the key issues were establishment of a union shop, protection against lay-offs, and an improved pension plan.*" (Emphasis ours.)

Boycotts to force compulsory union membership contracts on employers whose employees are not union members are frequent. Such boycotts are imposed by unions having union shop contracts with one employer to make other employers force their unwilling employees into the union although a majority of the second employers' employees may not desire to join that particular union, and even may be members of another union.

Illustrations of this sort of thing might be collected ad infinitum. Here are three illustrations that were used in the pamphlet published by the "Right-to-Work Committee" in presenting the Right-to-Work Amendment to the voters of Nebraska:

"DELAY DELIVERY OF FARM EQUIPMENT

"Here is a story taken from the files of Docket 391, No. 366 of the District Court of Douglas County, Nebraska.

"McAllister Transfer Co. has headquarters at York, Neb., and hauls merchandise for H. A. Zethren, owner of the local Coast to Coast Store, an important outlet for implements and other farm equipment.

"Early in 1946, certain labor bosses of the Omaha Teamsters Union Local 554, telephoned the McAllister manager and suggested he sign a closed shop contract compelling his employees to join the union and pay dues. McAllister's manager agreed to do so—provided his drivers wanted to join. But when approached, McAllister's employees told the labor bosses they were perfectly happy, had good working conditions and could not see how the union would benefit them.

"On May 6th, a McAllister driver stopped at the Omaha dock of Merchants Motor Freight, Inc. to pick up a shipment billed to Zethren's Coast to Coast Store at York, from Coast to Coast warehouse at St. Paul, Minn. A union checker told the driver: 'McAllister Freight. Can't give you no freight.' The driver asked 'why?' Said the checker, 'they are non-union operators. I don't want to be fined \$25.00 for giving it to you.'

"Shipments of saws, posthole diggers, cultivators, chicken feeders, welding equipment and other farm equipment badly needed by the farmers around York, Neb. continued to pile up on the Merchants Motor Freight dock until McAllister's attorneys were able to obtain a temporary injunction restraining the union from holding up the shipments.

"HOLD UP SHIPMENTS OF VITAL MEDICINES

"This story comes from case 12345, Docket 42, No. 245 of the District Court of Adams County, Nebraska. In spring of 1946, another labor boss set about to organize the Coffey Transfer Co. at Alma, Neb. Finding his employees were not interested in joining, owner Tom Coffey refused to sign a closed shop contract which would compel every employee to join the union and pay dues.

"On May 20th, Coffey Transfer picked up a shipment of two boxes of drugs and medicines from

McKesson Robbins at Omaha. These drugs were consigned to E. J. Dulifta at Farwell, Neb. Coffey hauled this shipment on 'open routing' from Omaha to Hastings. At Hastings he asked Borley Storage and Transfer Co.—agents for Nielsen & Peterson Transfer Co. who carry to Farwell, Neb.—to take the shipment. Borley refused saying he had been ordered by a labor boss not to take any freight from Coffey Transfer. Borley further said he would not dare oppose this order.

"Coffey then spotted a Nielsen & Peterson truck and asked the driver to take the shipment. But the driver replied, 'I would be fined \$25.00 by the union if I accepted it.'

"Coffey tried to get every unionized transfer company in Hastings to accept the medicine shipment but found that he was on the labor boss' 'black list.'

"ASSESS AND FINE WORKERS

"The Unionist—official publication of the A. F. of L. in Nebraska—reports in its issue of April 26, 1946, that: 'The organization drive being conducted among Omaha dairies will continue until ultimate goal—100 per cent organization of all Omaha dairies is concluded—according to Sam Winsky, business agent of General Drivers Union No. 554.'

"The article further states: 'Meanwhile, Omaha Central Labor Union at its regular meeting Friday night voted to keep three recalcitrant dairies on the "We Do Not Patronize List."'

"The Drivers organization has adopted a legislation which penalizes members to the amount of a \$25.00 fine if found guilty of patronizing a non-union dairy,' said the Unionist."

The Right-to-Work Amendment eliminated such strikes and boycotts by making the obtaining of a compulsory union membership contract impossible.

2. EQUALIZING BARGAINING POWER.

It is submitted that existing legislation gives the unions equality of bargaining power without compulsory union membership contracts, and that such contracts give unions much more than equality of bargaining power. It is the industries where the closed and union shop are most commonly found, that are most subjected to feather-bedding. A brief description of some of these practices is set out in "Trends in Collective Bargaining" written by S. T. Williamson and Herbert Harris, and published by the Twentieth Century Fund. (N. Y. 1945.) We quote from pages 108 and 109 as follows:

"* * * building trade locals have set up all manner of restrictions against labor-saving tools, practices and factory-prepared materials which would otherwise shorten the time they spend on a job. Some plasterers refuse to handle gypsum boards, and Boston plasterers limit the size of their hods. Bricklayers seek to ban hollow tile either by union regulation or municipal ordinance. In some cities all concrete must be mixed on the job. Painters try to persuade city governments to pass ordinances against the use of lead paints in spray guns. Milwaukee carpenters require all hardware to be fitted on the job. Glaziers' unions try to forbid off-the-job glass installation work. New York steamfitters demand all pipe cutting and threading to be done on the premises.

"These are a few of a long catalogue of union restrictions in the building trades which do more than they should to make building expensive. Largely

because of weakly organized contractors and of strong unions entrenched against change, technological advance has been obstructed in this industry."

The following is from pages 112 and 113:

"Restriction of output, however, is a tradition in printing trades unions. Many of these restrictions and regulations of working conditions never reach the stage of collective bargaining but are imposed upon employers in the shape of highly detailed union 'laws.' The pressmen's locals insist upon having a say about the number manning a press crew; which was partially responsible for the migration of magazine printing plants from New York City. Weirdest of all make-work rules in the printing trades is one governing the acceptance in newspaper composing rooms of advertising plates and of advertising matter which has been set in outside print shops. Under typographical union 'law' this matter may be used, provided a duplicate of it has been set up in the newspaper plant—and discarded."²⁷

²⁷ "This restriction corresponds to one in the musicians' union which requires the presence of union 'stand-ins' when nonunion musicians perform over radio stations."

Like the building trades and the printers, the American Federation of Musicians has been one of the most successful unions in obtaining union shop contracts. To quote the report of the House Committee on Education and Labor on the Labor-Management Relations Act of 1947:

"(17) 'Featherbedding': In this bill, as in the Lea bill, which passed both Houses last year by large majorities and now is law, an attempt is made to deal with a problem that is becoming a more and more serious menace to the productivity of our country and to the manufacture of goods at a cost within the reach of the millions of our citizens.

"The present bill is substantially less drastic than the Lea bill. The latter aimed to eliminate the practices of the American Federation of Musicians, which, under the leadership of J. Caesar Petrillo, requires employers to hire people who do no work, to pay for people the employers do not hire, and to hire more people than the employers have work for."

Examples of feather-bedding and other similar practices of unions which have obtained an overbalance of bargaining power due to compulsory union membership are given in "Labor's Hidden Holdup Men," the article written by Thurman Arnold and published in the Readers Digest of June, 1941. We quote the following:

"Everybody knows that labor unions are causing paralyzing strikes in national defense. Such strikes are dramatic and receive spectacular publicity; for that very reason the problem does not worry me greatly. Public opinion is already forcing a solution.

"The labor problem I am most worried about doesn't get headlines and the public doesn't know what is happening. That is why it is the most dangerous of all.

"It is the exploitation of low-income consumers, the destruction of small, independent businesses and the levying of tribute upon the workmen themselves by a few powerful strategically placed unions. These are unions which control the lines of communication between producers and consumers. They have erected toll bridges over which the necessities of life must pass. Usually without strikes, they can tell consumers what and from whom they can buy and how much they must pay. The consumers are victims of a hidden holdup against which there is no protection.

"These middlemen of labor—teamsters, carpenters, plumbers, electrical workers, glaziers, and so on—use many methods to exploit consumers unmercifully.

"One method is to force the employer to hire extra men for no good reason. The teamsters in New York decided that every truck entering the city must take on an unnecessary man who gets \$9 a day for doing no work. That's why it costs \$112 more to distribute a carload of vegetables through the Manhattan market than in neighboring regions free of labor exploitation. This idea was too good not to be imitated by unions all over the country. Electricians' unions in various cities insist that a full-time electrician be hired on any construction job using temporary power or light. Frequently he spends his day playing solitaire; his 'work' consists of pulling a switch one way when he arrives, the other way when he quits. Many operating engineers' unions will not allow a man to be hired for less than three days; if his employment exceeds that period he must be hired for a whole week.

"To milk dealers in New York who are willing to furnish milk at lower prices by keeping depots open only an hour and a half a day, the union says 'No.' Dealers must hire a full complement of labor full time, or shut up shop. Somebody in Dubuque had the bright idea that the delivery cost of two or three quarts of milk was the same as one. Therefore he offered a lower price to consumers who took more milk for their children. Here also the union said 'No.' In Chicago milk was being sold at lower cost to consumers willing to buy it at stores. The milk wagon drivers stepped in, and the more expensive system of bottle delivery was forced on low-income groups.

"By making alliances with each other, such unions extend their power to exploit consumers. Students at the University of Chicago formed a co-operative club. They bought milk cheaply from a farmers' co-operative. The milk wagon drivers told them to stop. The students insisted that in a free country they could buy where they pleased. So they had to be taught a lesson. First the union cut off their food deliveries. The students carried their own food. Then the union cut off their garbage service. The students capitulated.

"These 'middleman' unions likewise stop improvements in materials and methods. Look at what the Hod Carriers' Union is doing to Chicago. To mix concrete mechanically at a central plant and carry it to the job in trucks with revolving mixers improves quality and cuts down building costs—and subsequent rentals. But the Chicago hod carriers refuse to allow use of truck mixers.

"In Belleville, Ill., unions have been indicted with dealers and contractors for preventing the building of houses with prefabricated structural parts. In Houston, Texas, plumbers insisted that pipe made for particular jobs would not be installed unless the thread were cut off and a new thread made on the job. In Chicago, sash, frames and screens must be primed, painted and glazed on the job. Plumbers and electricians in other places insist that pipe cutting and wiring must be done on the job—more expensively than at the factory. Painters' unions in many districts will not permit the use of spray guns; brushes make more work. Similarly, in Washington, D. C., machinery must not be used to cut wire or thread pipe.

"It costs \$1000 more to build a six-room house in Cleveland than in Detroit. Why? One reason is that contractors who use prefabricated materials or eco-

nomical methods are afraid to do business in Cleveland.

"Incidentally, nobody gets that extra \$1000. Houses simply aren't built. In 1939, FHA loans for houses in Detroit totaled \$59,000,000; in Cleveland, only \$21,000,000. Not even organized labor profits. Cleveland carpenters made more by the hour; but Detroit carpenters had more work and larger annual incomes. Where high costs restrict building, the housing shortage gets more acute and labor has to pay higher rents out of less income.

"Many unions resort to the device of erecting local embargoes. In Chicago, a building trades council will not allow the use of stone which has been cut in Indiana. It must be brought in rough which increases freight costs 20 per cent; it must be cut in Chicago, though the quarries are more efficiently equipped to do the work. In Pittsburgh and San Francisco, carpenters' unions prohibit the use of millwork made out of town. New York metal lathers will not touch lath fabricated outside the city. All this flimflam, which is spreading all over the country, might be funny if it were not so expensive to people with low incomes who have to cut down on food in order to pay higher rents.

"Another threat of the holdup unions is to business competition and to the existence of small independent business concerns. In Washington, the teamsters threatened to strike to compel certain stores to increase the price of bread, the whole maneuver pleasing other retail stores that did not like the competition of a larger loaf for the standard price.

"Think of the owner of a little clothing store in Washington who had his shop painted by a CIO union. He then was picketed to compel him to have his shop repainted by the AFL union. He couldn't afford that expense."

Would employers agree to such union demands if the unions did not have much more than an equality of bargaining power?

3. PROMOTION OF BUSINESS EFFICIENCY.

Of course what we have already presented clearly indicates how compulsory union membership contracts hamper business efficiency. However, there are some phases of this point which have not already been covered which we would like to present in the words of Dr. Leo Wolman, who for eleven years was in the service of organized labor as Research Director of the Amalgamated Clothing Workers of America. He subsequently became professor of Economics at Columbia University. He is a well known authority on labor matters and his statistics on union membership for certain periods are published by the Bureau of Labor Statistics of the Department of Labor because of the lack of official figures. In 1942, Dr. Wolman wrote a series of editorials on current labor problems for the Washington Post. Because of Dr. Wolman's background his views are particularly illuminating. The following is an excerpt from one of these articles:

"The closed shop is the climax of a union's efforts to win recognition and status. Once the Union has wrested this major concession from the employer, it is in a position to begin to apply its full power. * * * Thereafter the right of management to make decisions on a score of matters affecting the conduct of the business and the shops is progressively and cumulatively restricted and more and more authority passes into the hands of the union and its officers. To this development the closed shop is the key.

"The importance of the closed shop in this connection derives from the power a closed shop union enjoys over hiring and firing. Men look to the union, not to the employer, for their jobs and depend upon the union to protect them against discharge. The stronger a union the tighter becomes its control over these vital functions. Responsibility for shop discipline, which is at first divided between union and management, rests at last largely with the union itself. At the same time a complex system of regulations governing promotion, the order of lay-off and rehiring, the disciplinary rights of supervision, and a multitude of related questions gets introduced into the factory's work, rules, is frequently amended in the interest of greater precision and detail, and tends to become increasingly inflexible in enforcement.

"Sharing Of Authority—This sharing of authority and relaxing of discipline, which organized labor's control of employment entails, spread meanwhile to practically all shop rules and practices. Methods of wage payment are called into question and are modified or replaced by others, as time work has replaced piece work in the automobile industry. The pace of work becomes subject to joint determination and frequent revision. New methods of work and new machinery can be adopted, if at all after consultation and with the consent of the union, and only then if the conditions of their operation are prescribed in advance and faithfully observed. In case of old and long-established unions extreme regulations of the sort applied by the building and musicians' unions go so far as to ban certain types of work altogether, professedly in order to protect the jobs of union employees.

"Beginning as a simple measure of union security, the closed shop thus flowers into an elaborate struc-

ture of restrictions and prohibitions. In consequence, unions operating under the closed shop tend to exhibit their least praiseworthy features, for the comparative freedom from curbs and checks which the closed shop assures a union encourages the use of restrictive and obstructive practices, to which unions are anyhow strongly addicted. To the efficient management of American industry these results of the more general adoption of the closed shop constitute the most serious threat of our current labor policy."

"Perhaps the support the Government is lending to one form or another of compulsory unionism is not too high a price to pay for a ban on strikes and organized labor's cooperation for the duration of the war. But it should be observed that everything we do has remote, as well as immediate effects. We should be well advised to think twice before we instruct our leading Government agencies to take the easy way in conceiving and interpreting the labor policy of this country during the next years."

4. PROTECTION OF EMPLOYERS AGAINST BEING ARBITRARILY PUT OUT OF BUSINESS BY USE OF COMPULSORY MEMBERSHIP CONTRACTS AND SECONDARY BOYCOTTS.

An illustration from the opinions of this court of the power of unions with compulsory membership contracts to put employers out of business is *Hunt v. Crumboch*, 325 U. S. 821, 65 S. Ct. 1545, 89 L. Ed. 1954. The following is from the opinion of the court:

"For about fourteen years prior to 1939, the petitioner, a business partnership engaged in motor trucking, carried freight under a contract with the Great Atlantic & Pacific Tea Co. (A & P). Eighty-five per cent of the merchandise thus hauled by petitioner was interstate, from and to Philadelphia,

Pennsylvania. The respondent union, composed of drivers and helpers, was affiliated with other A. F. of L. unions whose members worked at loading and hauling of freight by motor truck. In 1937, the respondent union called a strike of the truckers and haulers of A & P in Philadelphia *for the purpose of enforcing a closed shop*. The petitioner, refusing to unionize its business, attempted to operate during the strike. Much violence occurred.

"A & P and the union entered into a closed shop agreement, whereupon all contract haulers working for A & P, including the petitioner, were notified that their employees must join and become members of the union. All of the other contractor haulers except petitioner either joined the union or made closed shop agreements with it. The union, however, refused to negotiate with the petitioner, and declined to admit any of its employees to membership. Although petitioner's services had been satisfactory, A & P, at the union's instigation, cancelled its contract with petitioner in accordance with the obligations of its closed shop agreement with the union. Later, the petitioner obtained a contract with a different company, but again at the union's instigation, and upon the consummation of a closed shop contract by that company with the union, petitioner lost that contract and business. Because of the union's refusal to negotiate with the petitioner and to accept petitioner's employees as members, the petitioner was unable to obtain any further hauling contracts in Philadelphia."

The court held the union's action did not violate the Federal Antitrust laws. Four justices dissented. In his dissenting opinion Justice Jackson said:

"With this decision, the labor movement has come full circle. The working man has struggled long,

the fight has been filled with hatred, and conflict has been dangerous, but now workers may not be deprived of their livelihood merely because their employers oppose and they favor unions. Labor has won other fights as well, unemployment compensation, old-age benefits and, what is most important and the basis of all its gains, the recognition that *the opportunity to earn his support is not alone the concern of the individual but is the problem which all organized societies must contend with and conquer if they are to survive.* This Court now sustains the claim of a union to the right to deny participation in the economic world to an employer simply because the union dislikes him. This Court permits to employees the same arbitrary dominance over the economic sphere which they control that labor so long, so bitterly and so rightly asserted should belong to no man." (Italics ours.)

The people of Nebraska in adopting the Right-to-Work Amendment voted to place limitations on the "arbitrary dominance" which the labor union leaders otherwise might have. The Crumboch case is no isolated instance. Thurman Arnold, in his Readers Digest article, *supra*, cites similar cases. He says:

"In Detroit three wholesale paper dealers are told by the teamsters' union to go out of business. There is nothing they can do about it. They are not allowed to hire union men; they cannot get their paper hauled. The union has made a deal with some employers to eliminate competitors. Likewise, 65 independent truckers in Pittsburgh are being forced out of business in spite of the fact that they are willing to hire union labor."

5. PROTECTION OF EMPLOYERS AGAINST BEING FORCED INTO MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE BY UNION LEADERS USING THE WEAPONS OF COMPULSORY UNION MEMBERSHIP AND SECONDARY BOYCOTTS.

Allen Bradley Co. v. Local Union No. 3, 325 U. S. 797, 65 S. Ct. 1533, 89 L. Ed. 1939 (1945), was a suit brought by electrical equipment manufacturers from outside the City of New York to enjoin a combination of a labor union and local electrical equipment manufacturers and contractors in New York City to restrain competition in and to monopolize the marketing of electrical goods in New York City. In the opinion the court said:

"To achieve this latter goal—that is, to make more work for its own members—the union realized that local manufacturers, employers of the local members, must have the widest possible outlets for their product. The union therefore waged aggressive campaigns to obtain closed shop agreements with all local electrical equipment manufacturers and contractors. Using conventional labor union methods, such as strikes and boycotts, it gradually obtained more and more closed shop agreements in the New York City-area. Under these agreements, contractors were obligated to purchase equipment from none but local manufacturers who also had closed shop agreements with Local No. 3; manufacturers obligated themselves to confine their New York City sales to contractors employing the Local's members. In the course of time, this type of individual employer-employee agreement expanded into industry-wide understanding, looking not merely to terms and conditions of employment but also to price and market control. Agencies were set up composed of representatives of all three groups to boycott recalcitrant local contractors and manufacturers and

to bar from the area equipment manufactured outside its boundaries. The combination among the three groups, union, contractors, and manufacturers, became highly successful from the standpoint of all of them. The business of New York City manufacturers had a phenomenal growth, thereby multiplying the jobs available for the Local's members. Wages went up, hours were shortened, and the New York electrical equipment prices soared, to the decided financial profit of local contractors and manufacturers. The success is illustrated by the fact that some New York manufacturers sold their goods in the protected city market at one price and sold identical goods outside of New York at a far lower price. All of this took place, as the Circuit Court of Appeals declared, 'through the stifling of competition,' and because the three groups, in combination as 'co-partners' achieved 'a complete monopoly which they used to boycott the equipment manufactured by the plaintiffs.' Interstate sale of various types of electrical equipment has, by this powerful combination, been wholly suppressed." (*Italics ours.*)

The court found that the combination was a violation of the Federal Antitrust Acts because of the inclusion in the combination of business concerns, but directed that the injunction be limited to enjoining combinations of the union with non-labor groups. In his separate opinion Justice Roberts objected to this limitation. He said:

"There is no doubt that the programme adopted by Local No. 3 envisaged the exclusion, from the entire New York City area, of any electrical workers, whether engaged in manufacturing or installing electrical devices and equipment, except members of the Local. The organization from time to time increased the classes of members so as to add to its original membership of workers engaged in fabricating and installing electrical devices, equipment,

and apparatus the additional categories of shop employees engaged in manufacturing electrical equipment and all workers employed in alterations, additions, and repairs involving electrical equipment. It succeeded in unionizing and imposing closed shops employing only members of Local 3, not only on all building contractors, but on all repair contractors and their establishments and all manufacturers of electrical equipment. Membership in the union was closely restricted and the campaign eventuated in a situation where no electrical work could be done by persons other than members of the union, no building construction could be done by other than union men, no matter what their trade, and no manufactured electrical appliance or apparatus could be installed in the New York area without the consent of Local No. 3. That consent was given only if the device, appliance or apparatus was manufactured, or work done on it, by members of the Local. Complicated apparatus which had to be manufactured outside New York City, because no establishment making it existed within the city, had to be dismantled and rebuilt by members of the Local before it could be used in the New York area.

"It is true that before Local No. 3 obtained this complete control of the industry in its area of operation certain associated building contractors dealt jointly as an association with the union. As respects certain manufacturers which come under the dominance of the union this is not true. Nor is it true of repair businesses. On the contrary, it is the fact that each one of these was individually coerced by the union's power to agree to its terms. It is, therefore, inaccurate to say that the employers used the union to aid and abet them to restrain interstate commerce. Some of the employers, notably the building contractors, did jointly cooperate with the union; other sorts of employers were forced in-

dividually to comply with the union's demands, until all of them had succumbed.

* * *

"As I understand the opinion of the court, such a programme, and such a result, is wholly within the law provided only that employers do not jointly agree to comply with the union's demands. Unless I misread the opinion, the union is at liberty to impose every term and condition as shown by the record in this case and to enforce those conditions and procure an agreement from each employer to such conditions by calling strikes, by lockout, and boycott, provided only such employer agrees for himself alone and not in concert with any other."

Undoubtedly the situation achieved by Local Union No. 3 is that to which the A. F. of L. attorneys refer as "the ultimate goal of most union endeavor."

6. PROTECTION OF THE DEMOCRATIC PROCESSES IN THE UNIONS THEMSELVES AGAINST THE TENDENCY TO DICTATORIAL LEADERSHIP FOSTERED BY COMPULSORY MEMBERSHIP CONTRACTS WHICH DETER CRITICISM OF AND OPPOSITION TO EXISTING LEADERSHIP BY THREAT OF EXPULSION FROM THE UNION WITH THE LOSS OF THE RIGHT TO WORK.

The material we have presented under Point II-A of this brief, particularly the union constitutions authorizing expulsion from the unions of employees who openly voice dissatisfaction, or who seek to solicit votes for a change in the union program or officers, show that unions cannot well be democratic when compulsory union membership contracts enable union leaders to deprive of his right to work any member who criticizes them. But let

us add to that these quotations from enlightened union leaders.

Warren S. Stone, former head of the Brotherhood of Locomotive Engineers, said:

"I do not believe in forcing a man to join a union. If he wants to join, all right; but it is contrary to the principles of free government and the constitution of the United States to try to make him join. We of the engineers work willingly side by side with other engineers every day who do not belong to our union, although they enjoy without any objection on our part the advantages we have obtained. Some of them we would not have in the union; others we cannot get. What I say is, make the union so good they will want to join."

Maurice R. Franks, National Business Agent of the Railroad Yardmasters of North America, Inc., in an interview with an Omaha World-Herald reporter on January 17, 1944, expressed himself as being utterly opposed to the closed shop and said:

"They are dictatorial and undemocratic. Workers should want to join unions for the benefits they offer."

The Railroad Workers' Journal is the official organ of the Railroad Yardmasters of North America, a well known labor union. The following is a quotation from its editorial entitled "Closed Shop is Dictatorial," first published in its June, 1943, issue:

"It is understandable why some labor leaders favor the closed shop, since it automatically eliminates the necessity of any great effort to attain their personal objectives. It places them in the position of a dictator. Their slightest whims must be

satisfied or their wrath felt through dictatorial discipline, such as depriving a worker of his right to earn a living if he does not wholly accede to their demands.

"The closed shop is beneficial only to labor leaders. It places them in supreme authority—even more authority than employers. It eliminates the employer's natural prerogatives of employing competent and discharging incompetent, unworthy, or unneeded workers. It makes the union leader sole judge of who shall or shall not be employed, or shall or shall not be entitled to union membership. If a worker is not admitted or if he is expelled from a union, even through no fault of his own, he is deprived of earning a living.

"Records disclose instances where workers, under a closed shop, were deprived of employment for having courage to voice opinions contrary to their leaders. Jobs were lost through failure to pay tribute in the form of exorbitant initiation fees, dues, assessments, and many more unjust reasons. Yes, the closed shop is truly named. It is closed to every one not in the good graces of the 'powers that be.'"

W. J. Brown, head of the Assistant Clerks' Association (A union of British Civil Servants), which in 1941 had a membership of more than 90,000, in an address entitled "Labor in Britain Today," delivered at the American Management Association Personnel Conference, Philadelphia, October 1 and 2, 1941, made the following statement which was reprinted in the American Management Association Personnel Series No. 51:

"In the *first* place, while I desire every man and woman in the field I cover should be a member of my union, I do not want 'conscripts' in my union.

"In the *second* place, the closed shop arrangement seems to me to sterilize an existing set-up to

the prejudice of organic development. Now life is not static, it is dynamic. And any attempt to enclose it in unchangeable forms sooner or later produces explosion.

"In the *third* place, the closed shop seems to me to deprive the individual trade unionist of his final remedy against incompetent handling of his affairs by his union—the weapon of resignation. If my members are not satisfied with the way I run their affairs, they can resign and either join another union or start one of their own. This tends to keep trade-union leadership competent, keen and on its toes. The closed shop seems to me to remove this incentive."

7. PROTECTION OF INDIVIDUAL WORKERS, UNIONS, EMPLOYERS, AND THE PUBLIC FROM THE RESULTS OF STRIKES, MONOPOLIES, FEATHER-BEDDING, RACKETEERING AND ABUSES AND INJUSTICES FOSTERED BY COMPULSORY UNION MEMBERSHIP CONTRACTS.

The loss of production due to strikes, in the end is a loss to the public. The increased costs of goods and services due to union-fostered monopolies and restraints of trade and to feather-bedding in the end is borne largely by the public. The racketeering methods of the "middle men of labor," to adopt Thurman Arnold's expression, exploit consumers unmercifully. The American working man, referred to in the Congressional Committee report, makes up a large segment of the public. The elimination of compulsory union membership contracts will clearly tend to protect the public against these evils.

III.

NATURE AND EFFECT OF MOTIONS FOR JUDGMENT ON THE PLEADINGS AND DEMURRERS.

Having reinforced the presumption that legislation is an exercise in the interest of the public, by showing that the objects of the Right-to-Work Amendment are protection of the lives, health, morals, comfort, and general welfare of the people, and that the Right-to-Work Amendment clearly has a real and substantial relation to the objects sought to be attained, we shall now proceed to examine the plaintiffs' petition to see by what allegations they seek to show the contrary. We shall examine the petition in the light of the law as to the nature and effect of motions for judgment on the pleadings and demurrers. On this the court below (R54) stated the law as follows:

"As held by this court in *Johnson v. Marsh*, 146 Neb. 257, 19 N. W. (2d) 366: 'A general demurrer admits all allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the conclusions of the pleader, except when supported by, and necessarily result from, the facts pleaded. It does not admit inferences of the pleader from the facts alleged, nor mere expressions of opinion, nor theories of the pleader, nor allegations of the pleader as to what will happen in the future, nor arguments, nor allegations contrary to the facts of which judicial notice is taken or which are contrary to law.' See, also, 41 Am. Jur., Pleadings, s. 244, p. 463, and *Louisville & Nashville R. R. Co. v. Palmes*, 109 U. S. 244, 3 S. Ct. 193, 27 L. Ed. 922.

"Since a motion for judgment on the pleadings is in the nature of a demurrer and is in substance both

a motion and a demurrer, it has application in like manner as a demurrer under circumstances similar to those presented in the case at bar. See, *Vaughan v. Omaha Wimsett System Co.*, 143 Neb. 470, 9 N. W. (2d) 792; *State ex rel. Western Reference & Bond Assn. v. Kinney*, 138 Neb. 574, 293 N. W. 393, reversed on other grounds as *Olsen v. Nebraska*, 131 U. S. 236, 61 S. Ct. 862, 85 L. Ed. 1305, 133 A. L. R. 1500."

We may add to those citations *Pierce Oil Corp. v. Hope*, 248 U. S. 498, 39 S. Ct. 172, 63 L. Ed. 381 (1919); *Louisville & Nashville R. R. Co. v. Palmes*, 109 U. S. 244, 27 L. Ed. 922, 3 S. Ct. 193 (1883), and decisions of this court cited in *Rishel v. Pacific Mutual Life Insurance Company*, 78 Fed. (2d) 881, 131 A. L. R. 414.

The rule stated in *Johnson v. Marsh*, supra, was quoted from *Richter v. City of Lincoln*, 136 Neb. 289 285 N. W. 593, 594 (1939), which in turn quoted the above language from 6 *Standard Encyclopedia of Procedure*, 943-952. It is not a rule peculiar to Nebraska but is general law.

IV.

ALLEGATIONS OF PLAINTIFFS' PETITION EXAMINED.

(a) The allegations in paragraphs 1, 2, 6, 10 and 17 of the petition (R2,4,5,9), that plaintiff labor unions are voluntary associations, is, of course, a conclusion, the involuntary nature of the membership of a part of the members being made clear from the allegations that the unions would lose members and lose dues if they are not permitted to compel union membership by denying the right to work, to nonmembers.

(b) The allegation of paragraph 4 of the petition (R3) that the union shop is sought as a means of achieving equality of bargaining power is a conclusion. The court may well make its own conclusion, as did the voters of Nebraska, that it is sought as a means of securing an inequality of bargaining power overbalancing in the labor leaders' favor.

(c) The allegations in paragraph 11 (R6) that the most important collective bargaining agreements are those containing union shop or union security provisions and that the securing of such agreements is a necessary and indispensable concomitant of the assemblage of working people into labor organizations, and that the right to obtain and maintain such agreements constitutes a necessary and indispensable element of their proper functioning are conclusions, opinions, and predictions which are contrary to those which more logically follow from facts of which this court takes judicial notice.

(d) Whether union shop agreements and the right to enter into them constitute valuable property and civil rights in the plaintiffs as alleged in paragraph 12 (R7), is a conclusion of law which is not admitted by demurrer or motion for judgment on the pleadings. The allegations in the same paragraph that the union shop constitutes the most effective means of obtaining specified union objectives is a conclusion and opinion.

(e) With reference to paragraph 13 of the petition (R7), it would appear that the existence or nonexistence of a monopoly of the supply of labor is a conclusion. Of course, it is not a monopoly of the supply of labor the Right-to-Work Amendment aims to eliminate or prevent, but rather a monopoly of jobs—of the right to work.

(f) With reference to the allegations of paragraph 14 (R7) concerning admission to membership in labor unions in Nebraska the words "no arbitrary or unreasonable requirements" and "reasonable discipline" are allegations of opinion.

(g) The allegations of paragraph 15 (R8) that "all of the foregoing activities," and in particular union shop or union security activities, constitute the only effective means possessed by organized labor to accomplish economic security, etc., really allege nothing as to the union shop because it is coupled with "all of the foregoing activities," including legitimate activities. The allegation that "said activities are indispensable concomitants" of the right to organize and bargain collectively, is similar. But if the allegations are treated as applying to the union shop and union security agreements, taken singly and not as a part of "all of the foregoing activities," then they are conclusions and opinions and are contrary to those which more logically follow from the facts of which this court takes judicial notice.

(h) The enumeration of alleged benefits obtained through union shop and union security agreements in paragraph 16 (R8) of the petition is similar to that of paragraph 12, and the allegations are conclusions and matter of opinion and argument.

(i) The allegations of benefits in paragraph 25 (R11) are similar to those of paragraphs 12 and 16.

(j) The allegations of irreparable injury in paragraphs 28, 29, and 30 (R12,13) are not admitted by the motion for judgment on the pleadings, and the accompanying allegations predicting industrial strife, disruption of production, denial of collective bargaining, etc.,

are mere conclusions and predictions and are contrary to those which are more reasonably drawn from facts known to the court.

(k) The legal conclusions set forth in paragraph 35 (R16) of the petition are not admitted by the motion for judgment on the pleadings.

We shall proceed now with a discussion of the arguments contained in plaintiffs' petition, and in this connection we shall proceed to bring out additional facts and circumstances leading the adoption of the Nebraska Right-to-Work Amendment and showing the mischief it was intended to remedy.

In paragraph 12 (R6) of their petition, plaintiffs allege that the union shop or union security agreement constitutes the most effective means of obtaining certain benefits for labor organizations and their members. We pause to remark that a black jack and pistol are very effective means of obtaining benefits, but that is a poor argument for permitting their use. Plaintiffs list the benefits in subparagraphs as follows:

1. *Job Security and Protection from Employer Discrimination* (R7). There might have been some merit in this contention in the days when employers were free to discriminate against union men—to require yellow dog contracts, and to use the black list. But those days went into ancient history when the United States Supreme Court upheld the validity of the National Labor Relations Act which forbids discrimination on account of union membership or union activity. Added protection to union workers not subject to the Wagner Act is contained in this very Right-to-Work Amendment which protects

them as well as nonunion workers from discriminatory denial of employment or discharge. It is hardly an argument for the union shop that it is a means of accomplishing what has already been accomplished by statute. In this connection reference is also made to the allegations of paragraph 11 and paragraph 15 (R6,8) of plaintiffs' petition which may be attempts to say that the union shop is an indispensable concomitant of collective bargaining and strong unionism. Such a contention is obviously not true. This is illustrated by the fact that although the Railway Labor Act prohibits union security agreements, the railway brotherhoods are among the strongest unions. The Railway Labor Act outlawed discrimination and required collective bargaining. That was enough. The unions needed no compulsory union membership agreements.

In Great Britain and in Sweden trade unionism is very strong, but compulsory union membership agreements are rare. For a discussion of the British and Swedish situation we quote the following from "Democracy and the Closed Shop" by John Chamberlain, *Fortune Magazine*, January, 1942:

"The Swedes haven't a word for the solution of labor disputes. But they have a practical attitude that usually results in peaceful arbitration without trenching upon the basic rights of any party to the struggle. It all goes back to the watershed year of 1909 when Swedish employers, fearing the growing power of the trade unions, declared a lockout designed to break forever the strength of the John L. Lewises of the day. Labor's reply, Lewis-like in its flaring intransigence, took the extreme form of a Syndicalist-inspired general strike. As each side girded for the struggle, the Swedish people of all classes looked suddenly into an abyss. As they saw

it in that fateful year, if the employers were to get their way, the result would be the practical enslavement of the working class. But if the general strike were to be pushed to a successful terminus, it would result in the practical engrossment of Swedish industry and government by the trade unions. In brief, Sweden stood on the verge of black or red revolution in 1909, an either-or dilemma that the Swedish people, many of whom were farmers and fishermen and small tradesmen, did not want in the least to accept. They didn't want to accept it any more than the people of the U. S. want to accept it today.

"But, as is usually the case in supposedly either-or predicaments, a third way out was discovered by the Swedes. Labor and the employers, as it turned out, didn't want the revolution any more than the rest of Sweden wanted it. Faced with the terrifying implications of their acts, both parties to the struggle drew back. The unions, unable to get their way by the tacit civil-war threat of the general strike, returned to the long, slow, hard road of organizing to gain their ends by persuasion. And the employers, frightened by the prospect of pushing for an industrial feudalism that was no true wish of the majority, decided to keep their hands off the unions.

"Theoretically, the Swedish employers had consented to abstain from union baiting earlier in the century. As far back as 1902 they had banded together into a federation of industry-wide associations to counter the vertically organized power of industrial unionism. On paper this Employers' Federation had a curiously enlightened constitution — a document designed not only to protect the association's own members but also to guarantee labor's right to collective bargaining. But prior to 1909 the constitution meant about as much to the Swedish

employers as the Wagner Act has meant to those U. S. industrialists who have chosen to regard it as unconstitutional. Nothing worked in Sweden until after 1909, the year that provoked the great change of heart.

"The change of heart was mutual. The employers had refused to grant the principle of the closed, or the union shop to Swedish labor: for the sake of efficient management, they reserved the right to hire and dismiss workers at discretion, or to employ workers belonging to any union or to no union. But to sweeten their refusal of the closed shop, the individual employers, secure in the knowledge that they had the strength of industry-wide association behind them, also voluntarily relinquished the habit of union baiting. Labor itself did not press for the closed shop principle; and Swedish unionists now feel that compelling a man to join a union does not make for good trade unionists. As for the check-off, Swedish labor opinion feels that such a practice encourages collusion between management and the union leaders that does not always bode well for the rank and file.

"Sweden is admittedly not Utopia. Neither is England, which settled its labor problem along Swedish lines during World War I and after the unsuccessful general strike of 1926. But the Swedish and British way—the relinquishing by labor of the demand for the universal closed shop and the voluntary abstention on the part of employers from union baiting and other forms of social pressure on workers to keep them from joining unions—is the only way in which the labor 'problem' can be solved without suppressing two basic liberties. These liberties are the right of a man to work as he wills under his own conditions and the right of an employer to keep a nonunion man if he is giving satisfactory service."

The following is from "Trends in Collective Bargaining" by S. T. Williamson and Herbert Harris, published by the Twentieth Century Fund, 1945, page 42:

"The Closed-Shop Issue Abroad

"European quarrels in the late nineteenth century over closed-shop questions were as bitter as those which still rage in the United States. In Great Britain and Sweden they were settled voluntarily—either informally or by agreement; in Germany they were ended by law.

"The subject was long an active issue in Britain. One factor in its virtual disappearance was British industry's eventual and almost complete acceptance of collective bargaining. Another factor was the attitude of nonunion labor which rarely supported management in industrial disputes; when a union called a strike in a plant, nonunionists also laid down their tools and walked out. Few British collective agreements now specify union membership as a condition of employment, and the union shop prevails not by agreement but by custom.¹⁶

¹⁶ "Except among the seamen and firemen in the shipping industry closed-shop agreements are exceptional, and do not appear to be seriously sought for. Nevertheless, we were told by both union and employer representatives that in some industries there is virtually a closed shop in practice, as distinguished from one by contract, the employers preferring to engage union men and in some instances, at the request of the union, suggesting to particular individuals that they should join. The checkoff is very exceptional and several union representatives stated their opposition to it." *Report of the Commission on Industrial Relations in Great Britain*, Government Printing Office, Washington, 1938.

"The closed shop was a turbulent question in Sweden until 1906, when it was settled by the Employers' Federation and the Confederation of Trade Unions. These two powerful and almost inclusive central organizations agreed upon a formula whereby employers understood to recognize workers' rights to organize, and unions recognized employers' rights

to engage and dismiss employees without regard to whether or not they were union members. The substance of this understanding was then written into virtually all collective bargaining agreements. The closed-shop versus the open-shop issue evaporated 'because of the very large proportion of workers who are union members and because the employers no longer try to break down union organization, preferring to deal with their workers through strong trade unions.'¹⁷

¹⁷ *Report of the Commission on Industrial Relations in Sweden*, Government Printing Office, Washington, 1938.

In view of the success of unions in Sweden, Britain and the United States railroad without benefit of union security contracts, and in view of the existing statutory provisions preventing discrimination against unions and union workers, it is ridiculous to contend that compulsory union membership clauses are necessary to successful unionism.

2. *Equality of Bargaining Power.* We have already discussed this point (see page 42 to page 48 of this brief). The facts show that compulsory membership contracts gives the union very much more than an equality of bargaining power.

3. *Preventing Wage Competition by Nonunion Employee.* Where the union has a majority in the bargaining unit, under the National Labor Relations Act it is the bargaining agent, and the nonunion employee could not engage in wage competition even if he was so inclined.

4. *Elimination of Free Riders.* The Nebraska Right-to-Work Amendment in outlawing compulsory union

membership differs from the subsequently enacted Federal Labor Management Relations Act in that the latter, while outlawing the closed shop, permits a union shop or maintenance of membership contract (where a majority of employees who would be covered by the contract vote for it and the union complies with other provisions of the law) to the extent of requiring payment of union dues and initiation fees only. Under the present federal law, the Right-to-Work can be taken away only for non-payment of the regular dues and initiation fees—not for any other violation of union laws. If union leaders were sincere in relying on the “Free Riders” argument, if they were sincere in their claim that they welcome regulation of union security agreements, they would applaud the Labor Management Relations Act, but they have denounced the union security provisions of the Taft-Hartley Act as vehemently as they do the Nebraska Right-to-Work Amendment. Actually the Right-to-Work Amendment is better than the federal law in that the right of the union member to withdraw his financial support from the union as a protest against bad union leadership or union policies or program, is a most effective guarantee that the union leadership will be responsive to the wishes of the rank and file and that the union policies and program will be constructive. See the quotation from W. J. Brown, head of the Assistant Clerks’ Association, appearing at page 58 of this brief.

5. *Increased Union Responsibility.* Necessary discipline to require workers to perform their obligations may be imposed by the management if the union does not interfere with it. The discipline the union is more likely to exert is to force employees into attacks on their employers, rather than to force the workers to cooperate

with their employers. The discipline the closed shop enables the union to impose upon the workers is discipline to force them to cooperate with the union in such matters as secondary boycotts which may be used to force other employers to force their unwilling employees into the union, although a majority of the second employer's employees may not desire to join that particular union, and may even be members of another union.

For illustrations of this sort of thing, see pages 39-41 of this brief.

Union responsibility for their obligations under collective bargaining agreements when granted union shop contracts is illustrated by the experience of the Ford Motor Company which in 1941 signed a union shop checkoff contract. The press reported on November 30, 1941, that this contract, held as a "model" by union officials, had brought anything but industrial peace to the company. The New York Times on that date reported:

"There has hardly been a day since the contract was signed that production operations have not been halted by wildcat strikes, slowdowns or other forms of labor unrest or disturbance, the company says. Company officials said that in twenty-six consecutive days this Fall there were twenty-six production interruptions."

On November 14, 1945, the Ford Motor Company by Mel B. Lindquist, superintendent of Labor Relations, wrote to the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO, a letter which included the following:

"The Company agreed in 1941 to the union shop and check-off provisions. Its purpose in so doing

was not only to give the Union the benefit of membership and financial security, but to eliminate a great deal of friction, dispute, and downright industrial strife.

"In return, the Company was assured by Union representatives that it would receive greater security and that disturbances of the type then prevalent in other plants would be avoided.

"That contract, with its union shop and check-off provisions, was hailed by Union leaders and others throughout the country as one of the most progressive steps ever taken by Union and management toward industrial peace.

"Our experiences in the last four years have substantially dispelled this hope. The peaceful relations have not materialized. The experiment has been an unhappy one. The record shows, for example, 773 work stoppages since the signing of that contract in 1941.

"During this period, the cost to the Company of maintaining the check-off system has been huge. Last year, for example, the Company spent \$2,814,078.36 in the Dearborn area alone to collect these dues and fees, and to pay more than 1,000 Union men in the Company's plants who spent all or part of their time handling Union business.

"From August, 1941, through October, 1945, the Company collected for the Union in dues, initiation fees and special assessments a total of \$7,799,924.65.

"Last year the Union's income through the check-off system was \$2,050,563.71.

"The result has been that the Union has had membership and financial security, but the Company has had no compensating security. This has become so serious that unless some provision can be arrived at in our negotiations to require the union

to recognize and fulfill a responsibility of its own, the very future of the Ford Motor Company is at stake."

6. *Elimination of Jurisdictional Strife.* Jurisdictional strife can still exist where several different crafts, each having a closed shop contract, work in the same plant. They may fight over which one is to do certain work. Likewise, one closed shop union may refuse to work on material prepared by members of another union.

An illustration of the possibilities along this line is brought out in the statement of Frentress Hill, president of the Northern Redwood Lumber Company, before the House Committee on Education and Labor, March 3, 1947, and before the Senate Labor and Public Welfare Committee, on March 4, 1947. He was discussing the strike of the Lumber and Sawmill Workers of the United Brotherhood of Carpenters and Joiners against the Redwood Lumber Producers, to force union shop contracts on all of them. This strike began January 14, 1946, and was still on fourteen months later when Mr. Frentress made his statement. This statement is worth reading for its recitals of the many acts of personal violence, destruction of property, secondary boycotts, etc. arranged by union leaders in their attempt to force union shop contracts on this entire industry, but we quote only the following which is pertinent to the point now under discussion:

"The union has engaged in extensive primary and secondary boycotts, including the adoption by the General Executive Board of the United Brotherhood of Carpenters and Joiners of America, in April, 1946, of a resolution directing that the following law be inserted in the by-laws of all local unions

and district councils of the Brotherhood in the United States and Canada, to-wit:

“ ‘No member will use, handle, install or erect any material produced or manufactured from wood not made by members of the United Brotherhood.’

“Parenthetically, gentlemen, if you will analyze the tremendous scope of that resolution or by-laws which every local of the Brotherhood of Carpenters and Joiners, including Sawmill Workers locals, was directed to insert in its by-laws, you will observe that it prohibits the handling of any lumber produced by CIO workers. This can and probably will lead to one of the most widespread and destructive jurisdictional disputes in history unless jurisdictional strikes are outlawed.

“To appreciate the tremendous scope of such a boycott, you should know that there are hundreds of CIO locals of Lumber Workers in the five western states producing several billions of feet of lumber yearly. The AFL resolution to which I have just directed your attention will prohibit every AFL union carpenter in America (and, I am informed, all union carpenters belong to the AFL) from using any CIO lumber.”

To be sure, the union shop makes it difficult for employees who feel that they are not being well represented by their union, to withdraw from it and obtain representation more to their liking. An attempt to do so would probably result in the loss of their jobs. We appreciate the admission in subparagraph 6 of paragraph 12 of plaintiffs' petition that rival labor organizations do engage in raids and other disruptive tactics, but we think that the union shop and the demand for the union shop gives rise to much more disruption than it allays.

7. *Labor Management Cooperation.* There is much more to indicate that the closed shop frees union energies for organization of boycotts and demands for featherbedding than for constructive cooperation. To be sure, there have been good illustrations of constructive cooperation as in the clothing manufacturing unions. But unions can do the good they do without the union shop. Much of the evil they do they could not do without it.

Indeed if unions would give up their demands for the closed and union shops they would get more co-operation from the management of many concerns who quite reasonably are fearful and suspicious of many other union demands because they believe they may lead in the direction of the closed or union shop, and the "arbitrary dominance" they tend to give to union leaders.

Union Labor Monopoly. In paragraph 13 of plaintiffs' petition it is alleged that no labor organization in Nebraska has a monopoly. By this, apparently they mean they have not yet obtained a sufficient number of union shop agreements, which in paragraph 11 they allege to be an ultimate object of their organizations. Doubtless, they have not yet achieved a complete monopoly. But in the usual sense of the word, a monopoly consists of control of so large a part of the supply as to stifle competition and give the monopolist control over prices (or wages). The preventing of wage competition by non-union employees is alleged in paragraph 12, (3) of plaintiffs' petition to be one of the benefits of the union shop. If unions did not frequently constitute monopolies and restraints of trade there would be no need for the provision of the Clayton Act exempting them from the Sherman Act.

The illustrations commencing at page 39 of this brief are instances of the working of Labor Union Monopoly in Nebraska. The Crumboch case, page 50 of this brief, shows the working of a closed shop union monopoly. Another good illustration is *Allen Bradley Co. v. Local Union No. 3*, page 53 of this brief.

Admissions to and Expulsions from Unions. Paragraph 14 (R7) of plaintiffs' petition relates to admissions to and expulsions from unions in Nebraska. The allegation is doubtless intended to convey the impression that Nebraska unions, for the moment at least, are not subject to the same criticism as are other unions on the matter of admission and expulsion (see this brief, pages 22 to 36). But the words, "qualified applicants," "no arbitrary or unreasonable requirements," and "reasonable discipline" are conclusions and opinions. Perhaps the Nebraska Federation of Labor president, who verified the petition, would consider all of the illustrations of the tyranny of union leaders presented in this brief to be samples of "reasonable discipline."

Employers' Attitude. In paragraph 16 of plaintiffs' petition, the contention that some employers desire to maintain union shop contracts, may have some element of truth. Some employers have profited by the secondary boycotts their closed shop unions have inflicted upon their competitors. Some employers have been convicted of unlawful conspiracy with unions. More employers agree to union shop contracts in the hope of avoiding future harassment by the unions. But most employers are definitely opposed to union shop contracts. Witness the attitude of the National Association of Manufacturers, an organization of 16,500 manufacturing concerns em-

playing 75 per cent of the manufacturing employees of the nation, but two-thirds of whose member companies employ less than 500 employees each. Witness also the position of the Nebraska Small Business Men's Association.

The attitude of the public at large is opposed to the closed and union shop. The Right-to-Work Amendment carried by a large majority in Nebraska. Public opinion in the country at large is likewise strongly opposed to the closed and union shops.

The result of a number of public opinion surveys presented in N. A. M. Industrial Relations Department pamphlet entitled "The Closed Shop" is as follows:

"PUBLIC OPINION POLLS

"Polls of public opinion have repeatedly shown that the closed shop meets with general disfavor.

"A Gallup Poll announced on January 20, 1947, shows that only 8% of the public favor the closed shop, 18% of the public favor the union shop over the closed shop, and 66% of the public favor the open shop (in which the employee may decide for himself whether or not he wishes to join a union).

"Even among union members themselves, only 19% favor the closed shop and 33% favor the union shop. As high as 41% of union members favor the open shop.

"A recent Opinion Research Poll showed only 7% of the public favoring the closed shop.

"Similar returns were obtained recently by radio station KQV of Pittsburg through a telephone poll. Only 16.8% voted in favor of the closed shop, while 83.2% were opposed. Even in labor areas a majority opposed the closed shop.

"The Minneapolis Tribune, polling Minnesota sentiment, found 57% favoring a state law to prohibit closed shops and 15% advocating a federal law.

"In a poll by Factory Management* (McGraw Hill Co.—Jan. 1947), 70% of union members favored (by 2 or 3 to 1) outlawing the closed and union shop.

"The question, 'Which do you favor, the open shop, the union shop or the closed shop?' had been asked of workers every year save one, since 1941. Analysis of these surveys presents two definite trends—a trend toward the open shop, and a trend away from the closed shop. Six years ago, about 3 out of every 10 workers favored the open shop; today about 6 out of 10 favors it. Six years ago, about 2 out of every 10 workers favored the closed shop; today only about 1 out of 20 favor it.

"Further evidence of workers' dissatisfaction with compulsory union membership was turned up by Factory in October, 1944. The question was this: 'Do you believe a man joins a union because he wants to, or because the union compels him to?' It was no surprise when 36% of nonunion workers said it was because he wants to. But among union members themselves, only a bare majority—56%—said that men join unions because they want to. And while 8% were undecided, 34% of union members frankly admitted that union membership is a matter not of desire but of compulsion."

To round out the picture of the unpopularity of compulsory union membership with employers, employees, the public and legislators, we quote the following from the opinion of the court below (R72):

"The people of this state initiated the amendment by original action, without legislative intervention, by filing petitions with the Secretary of State, which were signed by ten percent or more of the electors

of the state, so distributed as to include five percent or more of the electors of each of two-fifths or more of the counties of the state. At the election the amendment was adopted by a vote of 212,443 For and 142,702 Against. It is common knowledge that its provisions and purposes, as well as the reasons for its adoption or rejection, were widely publicized and ably presented to the electorate of this state prior to the election. It was adopted after considerate and deliberate action. Thus it was decided that its provisions were reasonable and necessary to safeguard the integrity of government and preserve the economic structure and security of the people for the protection of their welfare. With that decision, courts have no right to interfere.

"As conditions arising out of powerful industries required legislative regulation thereof to protect first the public generally, and then labor itself, which legislation courts generally have sustained, so now the people of this and other states have evidently decided that conditions have arisen in powerful industries and powerful labor forces as well, requiring legislative regulation of them both in order to protect the public. The Labor Management Relations Act of 1947 was ostensibly enacted for that purpose. As a basis for its enactment, Congress recognized, as disclosed by its committee reports, that such conditions were nation-wide in scope, and specifically provided for the integration of state laws therewith, characterized by the amendment already adopted in this state.

"We take judicial notice of the fact that at this writing no less than 18 states have enacted similar legislation, 6 by constitutional enactment and 12 by statutory provisions."

Record, page 70:

"In *Muller v. Oregon*, 208 U. S. 412, 28 S. Ct. 324, 52 L. Ed. 551, a statute regulating and limiting the hours of labor for female employees was sustained. In the opinion it was said: 'Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge.'

"In *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 399, 57 S. Ct. 578, 81 L. Ed. 703, 108, 108 A. L. R. 1330, it was said: 'The legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection. The adoption of similar requirements by many States evidences a deepseated conviction both as to the presence of the evil and as to the means adopted to check it. Legislative response to that conviction cannot be regarded as arbitrary or capricious, and that is all we have to decide.'"

V.

ASSIGNMENT OF ERRORS EXAMINED AND REFUTED.

We pass to a discussion of the constitutional questions raised in plaintiffs' petition and which they preserve in

their assignment of errors. The fifth assignment of error is a general one repeating the first four which are specific, and which we stated in condensed form in our summary of argument at page 10 of this brief.

A. Freedom of Speech and Assembly.

In sub-paragraph 1 of paragraph 35 of their petition (R16), in their Assignment of Error No. 4 (R82), and in their brief, appellants assert that the First Amendment to the Constitution of the United States guarantees them the right to make and enforce compulsory union membership contracts. The "right of the people peaceably to assemble" is stressed as the source of the claimed constitutional protection. The argument is this:

- (1) The right to form labor unions is guaranteed as part of the right of assembly;
- (2) The right to make the union effective is included in the right to form a union;
- (3) A union cannot be effective without compulsory union membership contracts;
- (4) Therefore, a state ban on compulsory union membership contracts is repugnant to the First Amendment.

We would not dignify this argument by calling it plausible or even specious. Its invalidity has always seemed so obvious to us that in earlier stages of this litigation we devoted little time or space to answering it. But since appellants have devoted the major part of their brief to presenting this argument, we shall give it some attention.

We shall first deal with Step (3) in the above argument, the contention that a union cannot be effective without compulsory union membership contracts.

"INDISPENSABILITY" OF COMPULSORY UNIONISM.

At the outset we refer to the discussion of the railway labor unions in this country and the British and Swedish unions commencing at page 65 of this brief. Indeed, appellants in their brief have now modified their claims as to the indispensability of compulsory membership contracts to unions by such statements as the following:

"absent statutory protection of the right of organization and an exclusive bargaining status" (appellants' brief, page 22).

"in states where no equivalent statutory framework of protection is afforded" (page 22).

"without the substitution of an equivalent protection of the basic right of self-organization" (page 27).

"unions in these states must, at least in intrastate industries, rely now as in the past on traditional practices to secure their existence" (page 27).

"in the absence of some equivalent statutory protection of the right of union organization" (page 37).

"absent factors of state protection" (page 118).

Their claim now is that compulsory union membership contracts are essential to unions in industries whose labor relations are not subject to the National Labor Relations Act as amended, that is, which do not affect interstate commerce.

Just what industries would those be? In *National Labor Relations Board v. Fainblatt*, 306 U. S. 601, 83 L. Ed. 1014 (1939), this court said:

"Long before the enactment of the National Labor Relations Act it had been many times held by this Court that the power of Congress extends to the protection of interstate commerce from interference or injury due to activities which are wholly intrastate.

* * *

"The power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small.

* * *

"The language of the National Labor Relations Act seems to make it plain that Congress has set no restrictions upon the jurisdiction of the Board to be determined or fixed exclusively by reference to the volume of interstate commerce involved.

* * *

"Examining the Act in the light of its purpose and of the circumstances in which it must be applied we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected more than that to which courts would apply the maxim de minimis."

We point out incidentally that it is specifically alleged in the petition in the case at bar that the employer, the appellee Northwestern Iron and Metal Company, is engaged in interstate commerce and is subject to the National Labor Relations Act (R4,5).

In the June 7, 1948, Labor Relations Reporter, (Vol. 22, No. 11, 22 L. R. R. 87), it is reported that Robert N. Denham, general counsel of the NLRB, in a statement before a sub-committee of the House of Representatives, said:

"The present thought of the Board—the present thought of my office, at any rate, and as indicated by some of the recent decisions of the Board—is that it is a rare case in which business does not affect commerce in some degree, and that where commerce is affected the Board has jurisdiction."

So the argument of appellants based on the claimed indispensability of compulsory union membership contracts is built up for some rare case where the federal law does not guarantee to a union the right to act as exclusive bargaining agent for all the employees of a bargaining unit of which its members constitute the majority. But even in such a case, the procedural pattern has been set by the federal law. Furthermore, the union and union members are protected by the Right-to-Work Amendment itself from discrimination in hiring and firing. The weapons of the yellow dog contract and the black list cannot be used by any anti-union employer in Nebraska. If with this protection the union cannot be effective, it is because it is unable to convince its prospective members that it has any good reason to exist. So much for the indispensability of compulsory union membership contracts.

We now turn to the second step in appellants' argument—their contention that the right to make the union effective is included in the right to form a union, the right to peaceably assemble. At this point the argument is simply absurd.

GUARANTEE THAT UNION BE EFFECTIVE.

Freedom of assembly means that people are permitted to gather together, enter into discussions, adopt resolu-

tions, etc. It cannot mean that the assembly must be effective in obtaining the results that those attending it might desire.

Does a state legislature which refuses to pass a soldiers' bonus bill deny freedom of assembly to the members of a veterans' organization which in convention has adopted a resolution asking for such a bonus? Or does a legislature which passes such a soldiers' bonus bill deny freedom of assembly to the members of a taxpayers' league which in convention has denounced the bonus bill? In either case the legislature has made one of these assemblies ineffective with regard to the particular legislation.

Is freedom of petition denied because the petition is ineffective in obtaining a desired end?

Is freedom of speech denied because the speech is not persuasive? Is freedom of the press denied because the editor may not force the public to read his paper? Is freedom of religion denied because converts may not be obtained by coercion or all who benefit compelled to pay for the support of the church? Quite the contrary. We find nothing in any of the cases cited in appellants' brief which tends to support their proposition. We will, however, devote a little attention to a few of these cases.

In *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184 (1921), 66 L. Ed. 189, at 200, this Court said:

"A suit by an employee who seeks to hold a labor union liable for seeking his discharge by threatening to strike unless his employer discharges him stands

on a different footing from a mere effort by a labor union to persuade employees to leave their employment. There are in such a combination against an employee the suggestions of coercion, attempted monopoly, deprivation of livelihood, and remoteness of the legal purpose of the union to better its members' condition * * *"

In *West Virginia State Board of Education v. Barnette*, 319 U. S. 624 at 641, 87 L. Ed. 1628 at 1639, it is said:

"Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

"It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent."

The following excerpts are taken from the opinion in *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U. S. 287, 85 L. Ed. 836:

"It is therefore relevant to remind that the power to deny what otherwise would be lawful picketing derives from the power of the states to prevent future coercion."

* * *

"A final word. Freedom of speech and freedom of the press cannot be too often invoked as basic to our scheme of society. But *these liberties will not*

be advanced or even maintained by denying to the states with all their resources, including the instrumentality of their courts, the power to deal with coercion due to extensive violence. If the people of Illinois desire to withdraw the use of the injunction in labor controversies, the democratic process for legislative reform is at their disposal. On the other hand, if they choose to leave their courts with the power which they have historically exercised, within the circumscribed limits which this opinion defines, and we deny them that instrument of government, that power has been taken from them permanently. Just because these industrial conflicts raise anxious difficulties, it is most important for us not to intrude into the realm of policy-making by reading our own notions into the Constitution." (Emphasis ours.)

In *Thomas v. Collins*, 323 U. S. 516 at 537 and 539, 89 L. Ed. 430 at 444, it is said:

"Accordingly, decision here has recognized that employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty. *National Labor Relations Bd. v. Virginia Electric & P. Co.*, 314 U. S. 469, 86 L. Ed. 348, 62 S. Ct. 344. Decisions of other courts have done likewise. *When to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed. Cf. National Labor Relations Bd. v. Virginia Electric & P. Co., supra.* But short of that limit the employer's freedom cannot be impaired. The Constitution protects no less the employees' converse right. *Of course espousal of the cause of labor is entitled to no higher constitutional protection than the espousal of any other lawful cause. It is entitled to the same protection."* (Emphasis ours.)

And in the concurring opinion of Mr. Justice Douglas joined in by Mr. Justice Black and Mr. Justice Murphy, it is said (323 U. S. 543, 544, 89 L. Ed. at 447):

"No one may be required to obtain a license in order to speak. But once he uses the economic power which he has over other men and their jobs to influence their action, he is doing more than exercising the freedom of speech protected by the First Amendment. That is true whether he be an employer or an employee. But as long as he does no more than speak he has the same unfettered right, no matter what side of an issue he espouses." (Emphasis ours.)

Forcing men into a labor union by taking away their right to work if they decline to join is neither speech nor assembly, but it is coercion. The limitations of the constitutionally protected right of free speech are passed when the speech, though it be speech, assumes the character of coercion.

A fortiori, no right to coerce workers into unions by compulsory membership contracts can be tacked onto the constitutionally protected rights of free speech and peaceable assembly as pretended concomitants thereof.

B. Equal Protection of the Law.

Assignment of Error 3 (R82) and sub-paragraph 5 of paragraph 35 of the petition (R19) assert that plaintiffs are deprived of the equal protection of the law by the Right-to-Work Amendment. But the assignment of error reflects a change of theory from the petition. Both assert that non-union workers are favored over union workers. The petition asserts that unions are discriminated against.

as compared with other types of so-called voluntary organization, but that assertion is not found in the assignment of error. It brings up for the first time a theory that the Right-to-Work Amendment is discriminatory because, while it prohibits compulsory union membership contracts, it permits "employers to retain all their traditional methods of consolidating gains against competition of other employers and against demands of organized labor." Just what appellants' attorneys think should be done to prevent employers from consolidating their gains against competition of other employers does not appear. It may be they think that federal and state laws against monopolies and restraints of trade and other statutory regulations of business are not what they should be. But, even assuming that, it does not follow that the state cannot protect the right to work by prohibiting compulsory union membership contracts.

In *NLRB v. Jones and Laughlin Steel Corporation*, 301 U. S. 1, 781 L. Ed. 893, 57 S. Ct. 615, 108 A. L. R. 1352 (1937), the court said:

"We have frequently said that the legislative authority, exerted within its proper field, need not embrace all the evils within its reach. The Constitution does not forbid 'cautious advance, step by step,' in dealing with evils which are exhibited in activities within the range of legislative power."

The statement in the assignment of error that the Right-to-Work Amendment permits employers to retain all of their traditional methods of consolidating gains against the demands of organized labor is simply not true. The Right-to-Work Amendment bans the use of the yellow dog contract and the black list by employers

just as surely as it bans the use of compulsory union membership contracts and the black list by unions. It protects the union man against discrimination in hiring and firing just as it protects the non-union man. It does give equal protection to both. The Nebraska amendment differs from the Arizona in that the latter does not prevent an employer from refusing to hire a union man or from discharging him because he is a member of the union. Even the Arizona amendment is not subject to attack under the equal protection clause as the Supreme Court of Arizona very well pointed out in its opinion in the American Sash and Door Co. case, which we quote as follows (67 Ariz. 20, 189 Pac. (2d) 912 at 920):

"We must point out that the equal protection clause requires only 'that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.' *Hayes v. Missouri*, 120 U. S. 68, 7 S. Ct. 350, 352, 30 L. Ed. 578. There is no question but that this test is here met. Nor is it necessary for the people to have encompassed in one constitutional amendment a corrective for all the evils which may or do arise in the field of employer-employee relations.

"* * * This Court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulations to all cases which it might possibly reach. The Legislature 'is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest.' If 'the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied.' There is no 'doctrinaire requirement' that the legislation should be couched in all embracing terms.

* * * West Coast Hotel Co. v. Parrish, supra (300 U. S. 379, 57 S. Ct. 585).

There is much more in the opinion in that case on the subject of equal protection, and we feel that the opinion deals quite adequately with the question here raised. Inasmuch as that case is being heard on appeal together with this one, and the opinion will be carefully examined by this court, we will not repeat here any more of the discussion or citations there appearing. We will close our discussion of this point by this excerpt from the opinion of the Supreme Court of Nebraska in this case (R64):

"Plaintiffs argued that the amendment constituted class legislation and denied unions and union members equal protection of the laws, contrary to the Fourteenth Amendment. We cannot sustain that contention. The amendment prohibits no one from joining a union, but undertakes to lawfully assert that neither membership nor non-membership in a union shall be a condition precedent to the right to work. It is inclusive of all employers and employees in this state. It does not deny the union member the equal protection of the law, but gives the non-union employee a protection of the law which he had not theretofore enjoyed."

C. Impairment of the Obligation of Contracts.

Assignment of Error No. 2 (R81) and sub-paragraph 2 of paragraph 35 of the petition (R17) assert that the Right-to-Work Amendment impairs the obligation of contracts entered into prior to the adoption of said amendment, all in violation of Article I, Section 10 of the United States Constitution.

The attention given to this assignment of error in appellants' brief is so slight that we believe we are entitled to consider that they have abandoned any argument based on the contract clause. However, since they have included it in their specifications of error, and do make some mention of it at page 87 of their brief, we have decided not to omit from this brief the following reply to the argument made by appellants in the court below:

The rule of law on this point is clearly stated in 12 Am. Jur., Constitutional Law, Section 421, as follows:

"The constitutional protection of the obligation of contracts is necessarily subject to the police power of the state, and therefore a statute passed in the legitimate exercise of the police power will be upheld by the courts, although it incidentally destroys existing contract rights."

Numerous cases from the United States Supreme Court are cited in the footnote in support of the quoted proposition.

Among the United States Supreme Court cases supporting the above proposition is *Home Building and Loan Assn. v. Blaisdell*, 290 U. S. 398, 78 L. Ed. 413 (1934), where the court said: "The police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals."

The following cases and others were quoted in the opinion of the court below (R76,77,78) on this point as follows:

"In *Indiana ex rel. Anderson v. Brand*, 303 U. S. 95, 108, 58 S. Ct. 443, 82 L. Ed. 685, 113 A. L. R. 1482, it was said: 'Our decisions recognize that every contract is made subject to the implied condition that its fulfillment may be frustrated by a proper exercise of the police power * * *'

"In *Manigault v. Springs*, 199 U. S. 473, 26 S. Ct. 127, 50 L. Ed. 274, it was said: 'It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers * * * for the general good of the public, though contracts previously entered into by individuals may thereby be affected.'

"In *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 28 S. Ct. 529, 52 L. Ed. 828, it was said: 'One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them.'"

Appellants' argument that the Right-to-Work Amendment is invalid under the contract clause is based on their attempt to apply, out of context, excerpts from the opinions in two cases dealing with legislation which had to be justified by the existence of an emergency. In *Home Building and Loan Company v. Blaisdell*, supra the depression gave rise to the emergency which justified the mortgage foreclosure moratorium. In *Worthen Co. v. Thomas*, 292 U. S. 426, 78 L. Ed. 1344 (1934), it was held that a statute placing insurance proceeds beyond the reach of the beneficiary's existing creditors, which act contained no limitations as to time, amount, circumstances or need, cannot be justified as an emergency measure.

The opinions in both of those cases made it clear that emergency legislation was only one type of legislation

which could be sustained in spite of the fact that it impaired existing contracts. In the Worthen opinion the court, referring to the Blaisdell case, said (292 U. S. at 433, 78 L. Ed. at 1347):

"We held that this reserved protective power extended not only to legislation to safeguard the public health, public safety, and public morals, and to prevent injurious practices in business subject to legislative regulation, despite interference with existing contracts,—an exercise of the State's necessary authority which has had frequent illustration—but also to those extraordinary conditions in which a public disaster calls for temporary relief."

The Right-to-Work Amendment does not come under the "but also," but does come under the "not only." It is not temporary relief for a public disaster. It is legislation to "safeguard the public health, public safety, and public morals, and to prevent injurious practices in business subject to legislative regulation." It is permanent legislation designed to eliminate what would otherwise be a permanent evil. It is a case like those listed in the Blaisdell opinion in 290 U. S. at page 436, 78 L. Ed. at page 428, which list includes cases on abolition of lotteries and prohibition of sale of liquor. We close the discussion of this point with a quotation from the Blaisdell case which is appropriate to this case (290 U. S. at page 438, 78 L. Ed. at page 429):

"Where the protective power of the State is exercised in a manner otherwise appropriate in the regulation of a business it is no objection that the performance of existing contracts may be frustrated by the prohibition of injurious practices."

**D. Deprivation of Liberty Without Due Process—
Prohibition vs. Regulation.**

In the first assignment of error (R81) the appellants assert that the Right-to-Work Amendment, by reason of its absolute and unconditional proscription against entering into compulsory union membership agreements, is arbitrary, unreasonable, excessive and without rational basis, and deprives the union appellants of liberty protected under the Fourteenth Amendment. In subparagraph 35 of the petition (R18) the point of deprivation of liberty of contract without due process was raised in more general terms, but now appellants seem to rely almost entirely on the proposition that although regulation is permissible, the Right-to-Work Amendment is not regulation but is prohibition, and that that is not permissible. The distinction appellants' counsel attempt to make between regulation and prohibition is wholly inapplicable to the present case. There is no rule preventing prohibition of occupations or businesses. The rule is stated in 11 Am. Jur., Constitutional Law, Section 291, as follows:

Sec. 291. Generally.—The general rule is well settled that whenever it is necessary for the preservation of the public health, safety, morals, or peace or for the promotion of the general welfare of the community, the legislature may prohibit absolutely the carrying on of any particular business, calling, trade, or enterprise. A calling may not be immoral in itself, and yet the tendency of what is generally, ordinarily, or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If, in the consideration of the circumstances that attend or which may ordinarily attend the pursuit of a particular calling, the state


thinks that certain admitted evils cannot be successfully reached unless that calling is actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matters, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear unmistakable infringement of rights secured by the fundamental law."

The purported rule plaintiffs' attorneys are attempting to draw up is merely an application of the general rule that the guaranty of due process demands only that the law shall not be unreasonable, arbitrary or capricious; and that the means selected shall have a real and substantial relation to the object sought to be attained.

In the cases cited by appellants in their brief, pages 105 to 108, it was held that it was unreasonable, arbitrary or capricious to prohibit useful and beneficial businesses such as employment agencies (*Adams v. Tanner*), manufacturing comforters from shoddy (*Weaver v. Palmer Bros. Co.*), the manufacture of mattresses; etc., from second-hand material (*People v. Weiner*), the undertaking business (*People v. Ringe*), the banking business by individuals (*Marymont v. Nevada State Banking Board*), the vocation of dry cleaning (*North Carolina v. Harris*), and auction sales (*Webber v. City of Scottsbluff*). In each of the cited cases the usefulness, lawfulness and beneficialness of the business prohibited is emphasized, and the fact that the thing prohibited was a business or vocation was emphasized. The closed shop is not a beneficial business or vocation. It is not a business or vocation at all. It is merely one of the incidents of present-day union activity.

All reasonable regulation involves some prohibition.

The regulations of the employer-employee relationship upheld by this court as listed in the quotation from *West Coast Oil Company v. Parrish*, at page 13 of this brief, all involved some prohibitions—prohibition of employment in excess of eight hours a day in underground mines and smelters, prohibition of payment of wages in store orders or other evidences of indebtedness not redeemable in cash, prohibition of payment of seamen's wages in advance, prohibition of contracts to pay miners employed at quantity rates upon the basis of screened coal instead of the weight of coal as originally produced at the mine, prohibition of contracts limiting liability for injuries to employees, and prohibition of a work day in excess of a certain number of hours.

A business is regulated by prohibiting what might otherwise be certain of its incidents or activities. Labor unions are regulated by the Right-to-Work Amendment, which prohibits closed shop contracts. All businesses in the State of Nebraska are regulated by the Right-to-Work Amendment to the extent that it prohibits employers from discriminating in hiring and firing on account of membership or non-membership in unions. 

To summarize, certain types of businesses can be prohibited, such as the liquor business. Prohibition in such cases is considered reasonable. Prohibition of certain other types of business characterized by the courts as useful and beneficial businesses is considered unreasonable and a lesser degree of regulation is permitted. But any regulation involves prohibition of some incidents of the business, although not of the business itself. The Right-to-Work Amendment is a reasonable regulation of

labor relations, labor unions and employers, which regulates, as all regulations do, by prohibiting one of the noxious practices sometimes incident to the subject of regulation.

We think we have completely answered appellants' argument on this point. But we will go further and consider the direction in which regulations of the type appellants' counsel appear to ask for would lead. No regulation short of that contained in the Right-to-Work Amendment could completely attain the primary object of the Right-to-Work Amendment—the protection of the individual's right to work from any attempt to deprive him of it either because he is or is not a member of a labor union. The restrictions of the Labor-Management Relations Act come as close as a less complete proscription can, but it does not protect the man whose religious convictions prevent his becoming a member of or contributing funds to a union. Nor does it preserve to the individual unionist his final remedy against incompetent or tyrannical union leadership—the right to withdraw his financial support from the union.

At page 104 of their brief appellants suggest other forms, of regulation of compulsory union membership contracts. No one of them nor a combination of all of them would accomplish all of the purposes of the Right-to-Work Amendment.

Of course, counsel for the appellants have suggested regulations other than the Right-to-Work Amendment with tongue in cheek, for when other types of regulation are suggested, they are as vehement in denouncing them and as vigorous in fighting them as they are in

opposing the Right-to-Work Amendment. They have opposed the regulation of the Labor-Management Relations Act no less than that of the Right-to-Work Amendment. As was well said in the dissenting opinion in *Wallace Corporation v. National Labor Relations Board*, 323 U. S. 248, 65 S. Ct. 238, 89 L. Ed. 216:

"We suppose that there is no right which organized labor of every shade of opinion in other matters would unite more strongly in demanding than the right of each union to control its own admissions to membership. Each union has insisted on its freedom to fix its own qualifications of applicants, to determine the vote by which individual admissions will be granted, to prescribe the initiation or admission fees, to fix the dues, to prescribe the duties to which members must be faithful and to decide when and why they may be expelled or disciplined."

The opposition of the A. F. of L. to regulations such as those they suggest on page 104 of their brief, has met with some success in the courts. In *International Brotherhood of Teamsters (A. F. of L.) v. Riley*, — N. H. —, 59 Atl. (2d) 476 (June 1, 1948), they obtained a decision of the Supreme Court of New Hampshire that although the Taft-Hartley Act permitted prohibition of compulsory union membership contracts, nevertheless, any state law which attempted to regulate them to a less extent, would be in conflict with the federal law and therefore void.

The constant repetition in appellants' brief of the argument that unions are like public utilities, would logically lead to the conclusion that they should be subject to comprehensive regulation as public utilities are. Their insistence that they should have a monopoly of the

supply of labor would logically call for a governmental wage fixing commission just as the lack of competition in furnishing the service rendered by utilities calls for governmental supervision of their rates. The claim of the unions to be industrial governments, entitled to establish their own rules for the government of industry, logically would lead to their absorption by political government which would then control the determination of wage rates as well as all other matters with which unions may be concerned. In some countries a logical culmination of these arguments has come to pass. But the philosophy of those countries is foreign to our American ideals of freedom.

The Right-to-Work Amendment prevents the unions from having the monopolies which they avow is their ultimate goal, and tends to render unnecessary detailed regulations. The Right-to-Work Amendment thus leaves the unions as the masters of their own internal affairs and leaves them substantially free from state control. The choice of the voters of Nebraska was in favor of freedom—freedom for the individual and in the long run, freedom for the unions.

What we have been saying is not by way of debating which of two or more types of regulation is preferable. This court is not the arbiter for such a debate. We have mentioned these matters merely because we feel that they tend to emphasize that it cannot be said that the decision of the people of Nebraska in adopting the Right-to-Work Amendment is without rational basis.

CONCLUSION.

We stated in the outset of this brief that except for the fact that the court had accepted jurisdiction of the case of *Whitaker, et al. v. North Carolina*, we would have filed a statement against jurisdiction on the ground that the contentions of appellants are so unsubstantial that they do not merit consideration by this court. After reading this brief, we believe the court will understand why we were prepared to make that assertion. We submit that it clearly appears that the Right-to-Work Amendment is legislation the object of which is to promote the general welfare; that the means selected have a real and substantial relation to the object sought to be attained; that it is not unreasonable, arbitrary or capricious. Furthermore, we submit that even a judge who may disagree as to the wisdom of the legislation, will recognize that the legislation must be upheld under the rule often repeated by this court that "with the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal." Certainly every member of this court must agree that it is not possible to say that this legislative decision of the people of Nebraska (as well as that of many other states, and of the United States Congress in the Railway Labor Act, the Bankruptcy Act, and the Labor-Management Relations Act) is without rational basis. The case should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 660 34

**GEORGE WHITAKER, A. M. DEBRÜHL, T. G.
EMBLER, ET AL.,**

Appellants,

vs.

STATE OF NORTH CAROLINA

**APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH
CAROLINA**

STATEMENT AS TO JURISDICTION

**J. ALBERT WOLL,
HERBERT S. THATCHER,
JAMES A. GLENN,
GEORGE PENNELL,**

Counsel for Appellants.

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SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1947

No. 78

STATE

vs.

GEORGE WHITAKER, A. M. DEBRUHL, T. G. EMBLER, H. E. SETZER, J. E. ROGERS, FRED BLACK AND R. B. ROBERTSON,

Appellants

STATEMENT IN SUPPORT OF JURISDICTION

Appellants, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled case on appeal, respectfully show:

A

Statutory Provisions Sustaining Jurisdiction

The statutory provision which sustains the jurisdiction of the Supreme Court of the United States in this appeal is Section 237(a) of the Judicial Code as amended, 28 U. S. C. A. 344(a).

The present case involves a final judgment in the highest court of the State of North Carolina where there was

drawn in question the validity of a statute of that State, namely, Chapter 328 of the Sessions Laws of 1947, on the grounds of its being repugnant to the United States Constitution, and the decision of that Court was in favor of the validity of such statute. Under such circumstances, Section 237(a) permits appeal to the United States Supreme Court.

B

The Statute of the State the Validity of Which Is Involved

The statute of the State of North Carolina the validity of which was affirmed by the North Carolina Supreme Court, and which is involved in this appeal, is Chapter 328 by the Sessions Laws of 1947. Sections 2, 3 and 5, in particular, are involved in this appeal. Chapter 328 reads as follows:

“An Act to Protect the Right to Work and to Declare the Public Policy of North Carolina with Respect to Membership or Non-membership in Labor Organizations as Affecting the Right to Work: To Make Unlawful and to Prohibit Contracts or Combinations Which Require Membership in Labor Unions, Organizations or Associations as a Condition of Employment: To Provide That Membership in or Payment of Money to Any Labor Organization or Association Shall Not Be Necessary for Employment or for Continuation of Employment and to Authorize Suits for Damages.

“The General Assembly of North Carolina do enact:

“Section 1. The right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraints and coercion. It is hereby declared to be the public policy of North Carolina that the right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization or association.

“Sec. 2. Any agreement or combination between any employer and any labor union or labor organization whereby persons not members of such union or organization shall be denied the right to work for said employer or whereby such membership is made a condition of employment or continuation of employment by such employer, or whereby any such union or organization acquires an employment monopoly in any enterprise, is hereby declared to be against the public policy and an illegal combination or conspiracy in restraint of trade or commerce in the State of North Carolina.

“Sec. 3. No person shall be required by an employer to become or remain a member of any labor union or labor organization as a condition of employment or continuation of employment by such employer.

“Sec. 4. No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment.

“Sec. 5. No employer shall require any person, as a condition of employment or continuation of employment to pay any dues, fees, or other charges of any kind to any labor union or labor organization.

“Sec. 6. Any person who may be denied employment or be deprived of continuation of his employment in violation of Sections 3, 4, and 5, or of one or more of such Sections, shall be entitled to recover from such employer and from any other person, firm, corporation, or association acting in concert with him by appropriate action in the courts of this State such damages as he may have sustained by reason of such denial or deprivation of employment.

“Sec. 7. The provisions of this Act shall not apply to any lawful contract in force on the effective date hereof but they shall apply in all respects to contracts entered into thereafter and to any renewal or extension of any existing contract.

"Sec. 8. If any clause, sentence, paragraph or part of this Act or the application thereof to any person or circumstance, shall, for any reason, be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this Act, and the application thereof to other person- or circumstances, but shall be confined to the part thereof directly involved in the controversy in which such judgment shall have been rendered and to the person or circumstance involved.

"Sec. 9. All laws and clauses of laws in conflict with this Act are hereby repealed.

"Sec. 10. This Act shall be in full force and effect from and after its ratification."

(Chapter 75 of the General Statutes makes combinations, conspiracies and contracts in restraint of trade illegal and punishable as misdemeanors.)

C

Date of Decision and Judgment and of Application for Appeal

The decision and judgment of the Supreme Court of the State of North Carolina, now sought to be reviewed, was rendered on December 19, 1947. The date on which the petition for appeal was presented was March 8th, 1948.

D

Nature of Case and Existence of Federal Questions

Appellant George Whitaker is a building contractor employing union labor in the City of Asheville, North Carolina. Appellant A. M. DeBruhl is an officer of the Asheville Building and Construction Trades Council, A. F. of L., and the remaining appellants are officers, agents and members

of local trade unions or craft organizations affiliated with the Council and with the American Federation of Labor, all functioning in the City of Asheville.

On May 20, 1947, the appellant Whitaker executed a collective bargaining agreement with the other appellants under which appellant Whitaker, among other things, agreed to employ only members of the local craft unions who were parties to such contracts. On July 15, 1947, a warrant was issued against the appellants charging them with having violated Chapter 328 of the Sessions Laws of 1947 (commonly known as the "Anti-Closed Shop Law") by having entered into such agreement. More specifically, the warrant charged that appellants had entered into

" . . . an illegal combination or conspiracy in restraint of the right to work and of trade or commerce in the State of North Carolina and against the public policy of the State of North Carolina, by executing a written agreement or contract by and between said employer and said Labor Unions and Organizations or combinations, whereby persons not members of said unions or organizations are denied the right to work for said employer, or whereby membership is made a condition of employment or continuation of said employment by said employer and whereby said named unions acquired an employment monopoly in any and all enterprises which may be undertaken by said employer are required to become or remain a member of a labor union or labor organization as a condition of employment or continuation of employment by said employer whereby said unions acquire an employment monopoly in any and all enterprises entered into by said employer in violation of House Bill #229, Session 1947, General Assembly of North Carolina, Chapter 328, 1947 Session Laws of North Carolina, and particularly sections 2-3 & 5 thereof, and Chapter 75 of the General Statutes of N. C. . . ."

Thereupon, the appellants, through their counsel, filing a written motion to quash the warrant, alleging, *inter alia*, that the said Chapter 328 was void, illegal and unconstitutional, in that it arbitrarily and unreasonably deprived defendants of fundamental rights, liberties and freedoms protected under the Fourteenth Amendment to the United States Constitution, deprived the appellants, other than Whitaker, of fundamental rights and freedoms guaranteed under the First Amendment as a concomitant of the right of assembly and speech and protected against invasion by the State under the Fourteenth Amendment, and denied such appellants equal protection of the laws contrary to the Fourteenth Amendment.

The motion was denied, and the appellants were tried before a jury. The jury found appellants guilty of the acts charged in the warrant and entered a verdict of guilty. The trial court adjudged the appellants guilty and imposed a fine of \$50 on each appellant. The appellants then moved for an arrest of judgment in which were raised the same constitutional objections that were raised under the motion to quash the warrant. This motion was likewise overruled. The appellants then assigned as error the trial court's action in overruling the motion to quash and the motion for arrest of judgment, as more particularly set forth in such motions, and appealed to the Supreme Court of the State of North Carolina.

From the foregoing it is evident that appellants raised the federal questions now being urged before this Court at every possible opportunity.

Appellants, pursuant to their appeal to the Supreme Court of North Carolina on the foregoing assignment of errors, briefed and argued the federal questions before that Supreme Court. On December 19, 1947, the Supreme Court of North Carolina handed down its decision and judgment in which it considered each of the federal questions raised.

by appellants, decided each of said questions adversely to appellants' contentions, and affirmed the conviction. A copy of such decision is attached hereto as "Exhibit A."

E

Substantiality of Questions Involved

Appellants respectfully represent that the questions involved in their appeal to the Supreme Court of the United States are of a substantial nature. That Court has many times stated that an appeal will not be dismissed for want of a substantial Federal question unless the contentions of the appellants are "clearly not debatable and utterly lacking in merit." *Hamilton v. Regents of University of California*, 293 U. S. 245, 258.

The precise issues involved in the present case, namely, the validity under the Federal Constitution of an absolute prohibition of closed-shop or any other type of union-security agreements by the State, were presented to and accepted by the United States Supreme Court in *American Federation of Labor v. Watson*, 327 U. S. 582. While the Supreme Court remanded that case to the State court for clarification of the meaning and scope of the Florida anti-closed-shop law there involved, all the Justices indicated that the issues there presented were substantial and important ones, fully warranting consideration and determination by the Court. In the present case, the North Carolina law has been considered and construed by the highest court of North Carolina, which court has held that under such law the mere making of union-security agreements constituted a criminal act punishable as a misdemeanor.

The North Carolina anti-closed-shop law involved herein has thus been authoritatively and finally construed completely to outlaw, not merely to condition or regulate, the making of union-security agreements in the State, so that

the use of such agreements is forbidden in the State under any and all circumstances and regardless of the desires of the parties involved or the inconsequential effect of any particular agreement upon the public health, safety and welfare. In his dissent in *Wallace Corporation v. National Labor Relations Board*, 323 U. S. 248, Justice Jackson quite aptly stated that "A closed shop is the ultimate goal of most union endeavor." The State of No. Car., without a public need therefor, and with no ascertainable public benefit, has arbitrarily decreed that this goal shall no longer be obtainable. One hundred and fifty years of trade union history and experience, and the evidence in this record, have clearly demonstrated that agreements requiring union membership as a condition of employment constitute the *only* proven and effective means for working people to obtain and insure (1) their collective security and the maintenance of their labor unions once organization is achieved; (2) an equality of bargaining power as a means of obtaining an adequate share of the joint product of capital and labor; and (3) the consolidation of gains achieved in collective bargaining and the protection of working standards through elimination of the cutthroat wage competition of non-union employees. Further, the union shop constitutes the sole means of achieving equality of sacrifice among employees by insuring that all who enjoy union wages and working conditions, obtained after years of struggle and deprivation, share in the cost of such benefits as members of the union rather than as "free riders." Not a few employers have found that such agreements result in stability of employment relationships, promotion of harmony and cooperation between employers and employees, and the elimination of jurisdictional strife and discord both in the plant and between rival labor organizations, and are an effective means of increasing production by eliminating suspicion

and hostility, and freeing union energies and resources for constructive cooperation rather than defensive sparring.

Whether the State can constitutionally outlaw all union-security agreements is, therefore, a matter of gravest importance to the fifteen million members of organized labor in this country, as well as to an increasingly large number of employers throughout the Nation. As seen from a recent bulletin issued by the Department of Labor (Defendants' Exhibits 1 and 2 in Record), almost 75% of the employees in all major industries now working under collective agreements are covered by union-security clauses. A decision by this Court is vitally necessary to remove the confusion and disruption occasioned by the law in question, and by similar laws passed in some eleven other States. It is respectfully submitted that the issue is one fully warranting consideration by the Supreme Court of the United States.

It is appellants' contention that, taking into consideration the traditional and important function of union-security agreements in our modern industrial society and, above all, their indispensability to the adequate and efficient functioning of the trade union movement of this country, the absolute prohibition of the union-security principle without equivalent substitute (such as might be found in state control as under the Railway Labor Act, or in compulsory arbitration), attempted under the North Carolina law, is arbitrary, excessive and without rational basis or justification either in the correction of any existing or cognizable abuses or in the protection of any public interest. Further, the law operates discriminatorily against organized workers and in favor both of employers and non-union employees in respect to the efforts and abilities of such classes of persons to achieve and maintain an adequate share in the national income. Economic, sociological and

other factual material, either as contained in the record of concerning which the Court can take judicial notice, is available in support of these contentions and have been presented to the North Carolina Supreme Court and will be presented to the Supreme Court of the United States both in a principal brief and in an economic brief. Such material demonstrates that the prohibitions of the North Carolina law exceed the permissible range of police power as prescribed in such cases as *Nebbia v. New York*, 291 U. S. 502; *West Coast Hotel v. Parrish*, 300 U. S. 379; and *Treigle v. Acme Homestead Association*, 297 U. S. 189. Further, it can be convincingly demonstrated that the legislation in question, providing as it does for complete prohibition rather than regulation of the institution of union security, and the total deprivation rather than conditioning, of constitutionally protected rights, is excessive and arbitrary under the doctrine of such cases as *Adams v. Tanner*, 244 U. S. 590; *D. E. Weaver v. Palmer Brothers Co.*, 270 U. S. 402; and *Liggett v. Baldridge*, 278 U. S. 105, regulation being amply sufficient to correct and possible abuses. As stated in the *Adams* case,

"Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."

Further, appellants assert impairment of rights of a more fundamental nature, entitled to greater protection under the Constitution than any right of property or contract. Union security goes to the very existence of labor organizations and their ability adequately to function on behalf of their members; the abolition of that institution, without any equivalent substitute, seriously impairs, if it does render completely ineffective^a, the right of organization itself, upheld as a fundamental right in *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U. S. 1, and found to comprise a concomitant of the right of assembly and speech in *Thomas v. Collins*, 323 U. S. 516. Since essential civil and personal rights are involved, a stricter test than that of possible rational basis is required. "The right of a state to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect." (*West Virginia v. Barnette*, 319 U. S. 624.) "Mere legislative preference for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the

^a As stated by the Supreme Court of Illinois in *Kemp v. Division 241*, 255 Ill. 213, 99 N. E. 389,

"... to deny them the right to determine whether their best interests required that they should be associated in their work only with members of their organization would imperil their very existence."

maintenance of democratic institutions." (*Thornhill v. Alabama*, 310 U. S. 88.)

The cases cited in the foregoing discussion involve appeals from determinations of state courts wherein the validity of state laws under the First and Fourteenth Amendments to the Constitution was contested; those cases, accordingly, are authority supporting the jurisdiction of the Supreme Court of the United States over the present question where similar constitutional issues have been raised and decided adversely by the Supreme Court of North Carolina.

It is respectfully submitted that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Section 344(a) of Title 28 of the U. S. Code.

Respectfully submitted,

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EXHIBIT "A"**IN THE SUPREME COURT OF NORTH CAROLINA****FALL TERM, 1947****No. 78****STATE****VS.****GEORGE WHITAKER, A. M. DEBRUHL, T. G. EMBLER, H. E. SETZER, J. E. ROGER, FRED BLACK and R. B. ROBERTSON**

Defendants' appeal from Nettles, J., July Term, 1947, Buncombe Superior Court.

This is a criminal action in which the defendants were charged with a violation of Sections 2, 3, and 5 of Chapter 328 of the Sessions Laws of 1947. For convenience of reference the statute is reproduced here in full.

"AN ACT to Protect the Right to Work and to Declare the Public Policy of North Carolina with Respect to Membership or Non-membership in Labor Organizations as Affecting the Right to Work; To Make Unlawful and to Prohibit Contracts or Combinations Which Require Membership in Labor Unions, Organizations or Associations as a Condition of Employment; To Provide That Membership in or Payment of Money to Any Labor Organization or Association Shall Not Be Necessary for Employment or For Continuation of Employment and to Authorize Suits for Damages.

The General Assembly of North Carolina do enact:

Section 1, The right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraints and coercion. It is hereby declared to be the public policy of North Carolina that the right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization or association.

Sec. 2. Any agreement or combination between any employer and any labor union or labor organization whereby persons not members of such union or organization shall be denied the right to work for said employer or whereby such membership is made a condition of employment or continuation of employment by such employer, or whereby any such union or organization acquires an employment monopoly in any enterprise, is hereby declared to be against the public policy and an illegal combination or conspiracy in restraint of trade or commerce in the State of North Carolina.

Sec. 3. No person shall be required by an employer to become or remain a member of any labor union or labor organization as a condition of employment or continuation of employment by such employer.

Sec. 4. No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment.

Sec. 5. No employer shall require any person, as a condition of employment or continuation of employment to pay any dues, fees, or other charges of any kind to any labor union or labor organization.

Sec. 6. Any person who may be denied employment or be deprived of continuation of his employment in violation of Sections 3, 4 and 5, or of one or more of such Sections, shall be entitled to recover from such employer and from any other person, firm, corporation, or association acting in concert with him by appropriate action in the courts of this State such damages as he may have sustained by reason of such denial or deprivation of employment.

Sec. 7. The provisions of this Act shall not apply to any lawful contract in force on the effective date hereof but they shall apply in all respects to contracts entered into thereafter and to any renewal or extension of any existing contract.

Sec. 8. If any clause, sentence, paragraph or part of this Act or the application thereof to any person or circum-

stance, shall, for any reason, be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this Act; and the application thereof to other person or circumstances, but shall be confined to the part thereof directly involved in the controversy in which such judgment shall have been rendered and to the person or circumstance involved.

Sec. 9. All laws and clauses of laws in conflict with this Act are hereby repealed.

Sec. 10. This Act shall be in full force and effect from and after its ratification."

Chapter 75 of the General Statutes makes combinations, conspiracies and contracts in restraint of trade illegal and punishable as misdemeanors.

The defendant, George Whitaker, was a building contractor of the City of Asheville. The defendant, A. M. DeBruhl, was an officer and agent of the Asheville Building and Construction Trades Council of that City. The other defendants were officers and agents of local trade unions or organizations affiliated with the American Federation of Labor, as was set out in the Warrant. The defendants were convicted in the Police Court of the City of Asheville, in which the case had been duly instituted and tried, and from the judgment and sentence in this case defendants gave notice of appeal to the Superior Court, where the case was tried *de novo*. When the case was called for trial in the Superior Court, the Solicitor announced that he would try the defendants in the original warrant issued in the Police Court.

The warrant charged the defendants, George Whitaker, an employer, and A. M. DeBruhl, an officer and agent of the Asheville Building and Construction Trades Council, T. G. Embler and the other defendants as officers and agents of local trade unions and organizations "did unlawfully and willfully enter into an illegal combination or conspiracy in restraint of the right to work and of trade or commerce in the State of North Carolina and against the public policy of the State of North Carolina, by executing a written agree-

ment or contract by and between said employer and said Labor Unions and Organizations or combinations; whereby persons not members of said unions or organizations are denied the right to work for said employer; or whereby membership is made a condition of employment or continuation of said employment by said employer and whereby said named unions acquired an employment monopoly in any and all enterprises which may be undertaken by said employer are required to become or remain a member of a labor union or labor organization as a condition of employment or continuation of employment by said employer whereby said unions acquire an employment monopoly in any and all enterprises entered into by said employer in violation of House Bill #229, Session 1947, General Assembly of North Carolina, Chapter 328, 1947 Session Laws of North Carolina, and particularly sections 2, 3 and 5 thereof, and Chapter 75 of the General Statutes of North Carolina.

In the Superior Court the defendants made a motion to quash the warrant on the alleged grounds that the warrant did not charge a criminal offense and that Chapter 328 of the Session Laws of 1947 was enacted in violation of Article I, Section 17, of the Constitution of North Carolina and in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Federal Constitution; and it was further alleged that the Act was in violation of freedom of speech in assembly guaranteed by the First Amendment to the Federal Constitution and protection from State invasion by the Fourteenth Amendment.

The defendants also alleged the Act was in conflict with the Labor Management Act of 1947 and Article VI, Section 2, of the Federal Constitution, but this argument was not pressed on appeal to this Court.

The motion to quash was overruled, to which the defendants accepted.

All of the defendants were convicted by the jury on the offenses charged in the warrant. The defendants thereupon made a motion for an arrest of judgment, assigning as grounds therefor the same reasons set out in the motion to quash.

This motion was overruled and sentence was imposed by the Court that each of the defendants pay a fine of \$50.00

and also pay one-seventh of the costs. From this judgment and sentence the defendants appealed to this Court.

The charge of the Court to the jury was not sent up with the record and it is, therefore, to be taken that the Judge fully complied with the statute, G. S. 1-180, and stated in a plain and correct manner the evidence given in the case and declared and explained the law arising thereon.

In the brief of the defendants filed in this case, it is conceded that if the statutes alleged to have been violated are valid, the warrant properly charges the offenses alleged, and that there was adequate evidence of the violation of the statute. The defendants in their brief abandoned their assignments of error Nos. 1, 2 and 3, except as to their contention that a violation of Section 3 of the 1947 Act did not constitute a criminal offense.

From the State's evidence it appeared that the defendant, George Whitaker, was a local building contractor engaged in local construction work and had been such for many years. The defendant, A. M. DeBruhl, was an officer and agent of the Asheville Building and Construction Trades Council. The defendant, T. G. Embler, was an officer and agent of the International Brotherhood of Electric Workers, Local Union No. 238; H. E. Setzer, an officer and agent of the United Brotherhood of Carpenters and Joiners of America, Local Union No. 384; J. E. Rogers, an officer and Agent of the Brotherhood of Painters, Paper Hangers, and Decorators of America, Local Union No. 839; Fred Black, an officer and agent of the Bricklayers, Masons and Plasterers International Union of America, Local Union No. 1; and R. B. Robertson, an officer and agent of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Asheville Local Union No. 487.

These labor unions or organizations are all affiliated with the American Federation of Labor, with a total membership of approximately 1,260.

These defendants, by their own admission, had entered into a written contract dated the 25th of May, 1947, which was offered in evidence. This contract provided that the employer agreed to recognize the labor unions of Asheville and vicinity as the spokesmen for the workmen in the in-

dustry and the representatives of their respective trades taken collectively. It was agreed that the employer would employ none but the union members, affiliated with the Building and Construction Trades Council composed of the various unions mentioned. The use of members in good standing of the labor unions by the employer was to include skilled, semi-skilled and unskilled labor on all work thereafter to be done, directly or indirectly, by the employer.

In Section 4 of the contract, the employer agreed to abide by all rules and regulations of the respective trades affiliated with the Building and Construction Trades Council, and comply with the rates of wages and specified hours recognized by the respective trades. Sub-contractors, if employed, would be likewise bound.

The contract in Section 6 recognized the right of the employer to discharge an employee for incompetency, intoxication or other just causes. Provision was made for arbitration in cases of disputes or differences. The agreement was to be in effect from the 25th of May, 1947, until the 25th of May, 1949, and to continue from year to year unless either party expresses a desire for a change ninety days prior to any annual termination date.

Evidence for the State was not contradicted by any of the defendants. Defendants, however, offered as witnesses certain officers of the State Federation of Labor who, without objection on the part of the State, made statements in the form of arguments, presenting their views as to union security agreements upon the economic welfare of employers and employees and the people of the State generally.

The defendant, George Whitaker, testified in the case and gave his reasons for his willingness to enter into the closed shop contract with the labor unions, which is set out in the record. He did not deny that he had entered into the contract.

The jury returned their verdict:

"That the defendants are guilty of violating the provisions of House Bill #229, 1947 Session of the General Assembly of N. C., Chapter 328, 1947 Session Laws of North Carolina, and Chapter 75 of the General Statutes of North Carolina, as charged in the warrant."

On the coming in of the verdict the defendants moved to set it aside for errors committed on the trial. The motion was overruled and defendants excepted. Judgment was entered on the verdict that defendants pay a fine each of \$50.00 and each pay one-seventh of the costs.

The defendants moved for an arrest of judgment for the grounds above alleged, and the motion was overruled. Defendants excepted.

To the judgment rendered defendants objected, and excepted; and appealed, assigning errors.

HARRY McMULLAN,

Attorney General;

T. W. BRUTON,

HUGHES J. RHODES,

RALPH MOODY,

Asst. Attys. General, for the State.

GEORGE PENNELL,

PADWAY, WOLL, THATCHER, KAISER,

GLENN & WILSON,

By HERBERT S. THATCHER,

For Defendants, Appellants.

SEAWELL, J.:

The question whether violation of Sections 3, 4 and 5 of the challenged statute constitutes a criminal offense was raised in *State v. Bishop*, *post*, and affirmatively answered. To this we refer.

Insofar as the same question is raised in this case, it may be, on the same reasoning similarly answered.

We note that appellants' brief abandons assignments of error No. 1 (R. pp. 4 & 30) and No. 2 (R. pp. 14 & 30) relating to the sufficiency of the warrant to state the charge and the sufficiency of the evidence to convict, if the statute is declaratory of a criminal offence, except that they insist on the motion to quash the warrant and arrest the judgment for that cause. We have referred to the contention, *supra*. The defence stresses the contention that Chapter 328 is in contravention of both the State and Federal Constitutions, and, therefore, void.

While the basic laws under which the validity of the challenged legislation must be determined are elementary, they

are, nevertheless, so fundamental as to bear summarization at this point. The Tenth Amendment to the Constitution of the United States provides, "The powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved for the States respectively or to the people." Within this reservation of powers to the individual states, is what has been judicially termed "the police power."¹ Chapter 328 of the General Session Laws of 1947 was enacted in attempted exercise of that power. The authority of the legislature to pass this statute, or any other measure it may deem necessary in the public welfare, is unlimited except where prohibited by the Federal or State Constitution or in conflict with Federal law enacted pursuant to constitutionally granted authority. The enactment in question has been challenged as prohibited by the Fourteenth Amendment to the Federal Constitution and Article I, Section 17, of the State Constitution.

Neither the Fourteenth Amendment nor Article I, Section 17, contains an unqualified prohibition. Both operate to prevent the legislature from depriving anyone of individual or property rights except by due process of law. Due process is, of necessity, an elastic term which through the years has been expanded to cope with the varying problems of our increasingly complex society.

The flexible restraints which the Fourteenth Amendment has placed upon the use of its police power by a state are carefully set forth by Mr. Justice Roberts in *Nebbia v. New York*, 291 U. S. 502, at pages 523 and 525:

"Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights or contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm.

¹ "What are the police powers of a state? They are nothing more or less than the powers of Government inherent in every sovereignty to the extent of its dominion." Judge Taney, License cases, 5 How. 504, 583.

Equally fundamental with the private right is that of the public to regulate it in the common interest.

The Fifth Amendment, in the field of Federal activity, and the Fourteenth as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guarantee of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."

The elasticity of these restrictions upon the use of the police power is the life-giving elasticity of the Constitution itself so vital to our economic, social and political growth. Perhaps more than that of any other social force, the progress of labor toward its rightful place in our society would have been retarded if all statutes enacted in the exercise of the police power had been measured on the Procrustean bed of judicial precedent.² The dictates of the Fourteenth Amendment, that "the means selected shall have a real and substantial relation to the object sought to be obtained, must be viewed in the light of contemporary conditions under which the legislature has seen fit to enact the statute in question. However, it is obvious that a clear understanding of those conditions is impossible without some resort to the historical development of the govern-

² For instance, the Supreme Court of the United States has sustained, as valid exercise of this power, the statutes providing for maximum hours (Bunting v. Oregon, 243 U. S. 426), workmen's compensation (New York Central Railroad Co. v. White, 243 U. S. 188), prohibiting intimidation of employees (People v. Washburn, 285 Mich. 119; appeal denied, 305 U. S. 577) and prohibiting racial discrimination (Railway Mail Association v. Corsi, 326 U. S. 88).

mentally imposed rules for the struggle between the employer and the employed.³

Until recently, the struggle between management and labor has been demonstrably one-sided with Anglo-American law favoring the side possessing "the heaviest artillery." Since the first attempts within this country to define the legal weapons and areas of combat were based upon English precedent, a brief look in that direction may be helpful.

In England, any combination of laborers to raise wages or shorten hours was a crime until 1824.⁴ Until 1871, it was also a crime to threaten a strike or even to persuade an employee to leave his work;⁵ in 1875, Parliament enacted legislation providing that workmen would not be subject to indictment for criminal conspiracy in effecting collectively

³ "Whether a law enacted in the exercise of the police power is justly subject to the charge of being unreasonable or arbitrary, can ordinarily be determined only by a consideration of the contemporary conditions, social, industrial and political, of the community to be affected thereby. Resort to such facts is necessary, among other things, in order to appreciate the evils sought to be remedied and the possible effects of the remedy proposed. Nearly all legislation involves a weighing of public needs as against private desires; and likewise a weighing of relative social values. Since government is not an exact science, prevailing public opinion concerning the evils and the remedy is among the important facts deserving consideration; particularly, when the public conviction is both deep-seated and widespread and has been reached after deliberation. What, at any particular time, is the paramount public need is, necessarily largely a matter of judgment. Hence, in passing upon the validity of a law challenged as being unreasonable, aid may be derived from the experience of other countries and of the several States of our Union in which the common law and its conceptions of liberty and of property prevail. The history of the rules governing contests between employer and employed in the several English-speaking countries illustrates both the susceptibility of such rules to change and the variety of contemporary opinion as to what rules will best serve the public interest. The divergence of opinion in this difficult field of governmental action should admonish us not to declare a rule arbitrary and unreasonable merely because we are convinced that it is fraught with danger to the public weal, and thus to close the door to experiment within the law." Justice Brandeis, dissenting in *Union, Triax v. Corrigan*, 247 U. S. 312, 356.

⁴ 5 Geo. 4, C. 95.

⁵ Criminal Law Amendment Act (1871), 34 and 35, Vic. C. 32.

that which was lawful for one workman to do;⁶ while the closed shop was recognized as legal in 1898 by the House of Lords, acting as England's highest court,⁷ that body was unwilling to declare the boycott a legal weapon of labor although it had previously held it to be a permissible economic weapon when used by a combination of shipping firms;⁸ the boycott and peaceful picketing were legalized in 1906 by the Trade Disputes Act;⁹ following the general strike of 1926, Great Britain prohibited local and public authorities to enter closed shop agreements;¹⁰ that restriction was lifted in 1946.¹¹

Meanwhile, in this country early labor cases followed the English courts' interpretation of the common law. The Philadelphia Cordwainers' case is generally regarded as the first labor case in America; in 1806 a combination of journeymen shoemakers to effect a higher pay schedule was held illegal under the common law doctrine of criminal conspiracy.¹² This typified the early treatment of such matters. The courts made the initial inroads in the common law rules governing the employer-employee relationship, but the multiplicity of forums made for a variety of laws among the several states. The right of workingmen to form unions and strikes for legitimate ends was recognized in 1842,¹³ but the judicial views on what constituted legitimate ends differed greatly.¹⁴ Many states held the closed shop

⁶ The Conspiracy and Protection of Property Act (1875), 38 and 39 Vic. C. 86, Section 3.

⁷ *Allen v. Flood*, A. C. 1, 1898.

⁸ Compare *Mogul Steamship Co. v. McGregor* (1892), A. C. 25 and *Quinn v. Leathem* (1901), A. C. 495.

⁹ 6 Edw. 7, C. 47, Section 2.

¹⁰ Trade Disputes Act of 1927.

¹¹ Trades Disputes & Trade Unions Act, 1946, 9 & 10, Geo. 6, C. 52.

¹² *Commonwealth v. Pullis* (1806), *Documentary History of American Industrial Society*, Vol. 3, p. 59.

¹³ *Commonwealth v. Hunt*, 45 Mass. 111, Cited in S. v. Van Pelt, 136 N. C. 633.

¹⁴ For instance, in some jurisdictions the strike was held an illegal means of procuring a unionized shop, (*Plant v. Woods*, 176 Mass. 492) while in others it was held legal (*State v. Van Pelt*, *supra*).

illegal even in the absence of prohibitive statutes; while many others regarded it as justifiable and legal.¹⁵ It is not here necessary to multiply illustrations or attempt to catalogue judicial pronouncements on labor matters. It is, however, significant to note that Justice Brandeis in discussing this heterogeneous growth of labor relations law in his dissenting opinion in *Truax v. Corrigan*,¹⁶ first spoke of ". . . the absence of legislation, to determine what the public welfare demanded . . ." and then stated "Judges, being thus called upon to exercise a quasi-legislative function and weigh relative social values, naturally differed in their conclusions on such questions."

Ultimately, state legislatures did attempt "to determine what the public welfare demanded" by enacting laws defining the area of permissible conflict open to industrial combatants. Their general authority to do so has been firmly established.¹⁷ In the realm of labor contracts, the Supreme Court of the United States has sustained, as valid exercise of state police power, legislation providing for maximum hours,¹⁸ workmen's compensation,¹⁹ forbidding payment of seamen's wages in advance,²⁰ prohibiting intimidation of

¹⁵ Teller, *Labor Disputes & Collective Bargaining*, Vol. 2, Sec. 424 et seq.

¹⁶ *Supra*, page 3.

¹⁷ "The right of the state to determine whether the common interest is best served by imposing some restrictions upon the use of weapons for inflicting economic injury in the struggle of conflicting industrial forces has not previously been doubted." *Carpenters' Union v. Ritter's Cafe*, 315 U. S. 722, (at 725).

"That the State has power to regulate labor unions with a view to protecting the public interest is, as the Texas court said, hardly to be doubted." *Thomas v. Collins*, 323 U. S. 516, (at 532).

"It is true that the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of society in which they exist. This is but an instance of the power of the State to set the limits of permissible contests open to industrial combatants. *Thornhill v. Alabama*, 310 U. S. 88, pp. 103 & 104.

¹⁸ *Bunting v. Oregon*, *supra*.

¹⁹ *New York Central Railroad Co. v. White*, *supra*.

²⁰ *Patterson v. The Bark Endora*, 190 U. S. 169.

employees,²¹ and prohibiting racial discrimination.²² In commenting on the latter decision, Professor E. Merrick Dodd stated, "Whatever might have been thought to be the law in the days when liberty of contract was treated by the Supreme Court as an almost absolute constitutional privilege, the decision in the *Corsi* case was to be expected. It is a natural consequence both of the increase in the economic power of unions and of the Supreme Court's increasing recognition, in recent years, that to refuse to treat the economic power of particular private groups as a constitutional justification for their regulation is in effect to substitute private government for government of, by and for the people. Now that employers have lost what were formerly regarded as their constitutional rights of discriminating against union members and of paying less than legislatively-determined minimum wages, now that statutory bargaining rights granted to unions have been found to create implied duties not to discriminate against racial or religious groups, a union's claim that anti-discrimination laws infringe its constitutional liberties is a palpable anachronism. Moreover, what is true of labor unions, economic institutions which even when they have no closed shop agreements, tend to obtain a large measure of job control, is presumably true *a fortiori* of employers, who are the creators of jobs."²³

The most comprehensive gains made by labor have unquestionably been made in the field of Federal legislation. It is neither possible nor necessary for us to do more than highlight those gains in this opinion. *The Clayton Act* in 1914 restricted the use of the injunction in labor disputes in an effort to correct an almost universally recognized abuse of that judicial process.²⁴ This marked the first major step taken by Congress in enacting rules beneficial to labor in its conflict with management. However, it fell far short of its purpose and the Norris-LaGuardia Act in 1932 further and more specifically restricted the use of the in-

²¹ *People v. Washburn, supra.*

²² *Railway Mail Association v. Corsi, supra.*

²³ 58 HLR 1018 (a) 1061.

²⁴ *The Clayton Act*, Oct. 15, 1914, C. 323, Sec. 20, 38 Stat. 730, 738.

junction in addition to prohibiting "yellow dog contracts" and limiting the liability of union officials.²⁵ In 1935 Congress enacted the National Labor Relations Act²⁶ declaring the public policy of the United States to be the encouragement of collective bargaining and the protection of "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." To safeguard those rights the Act prohibited five specific types of unfair employer practices. It further provided for the settlement of questions as to who are to represent employees, and it specifically preserved the right to strike. Among other provisions of the Act was the authorization of closed shop agreements with the specific limitation that nothing contained in the Act would permit such agreements in states under whose laws they were illegal.

Perhaps it might be said with the passage of The National Labor Relations Act, "the labor movement has come full circle."²⁷ Perhaps that statute only marked a temporary high point in the progress of labor which will some day be surpassed. We cannot know now; and our feelings in the matter have no bearings upon the case at hand. What is more important to a consideration of this case is that Congress contemporaneously with the adoption of Chapter 328, by the North Carolina General Assembly, determined that it had gone too far in licensing weapons which labor might use in obtaining its ends and that further restrictions thereon were necessary in the public interest. The Taft-Hartley Act²⁸ was primarily adopted for that purpose. The purpose and provisions of that statute, therefore, become highly important to a consideration of the contemporary conditions out of which Chapter 328 also emerged.

²⁵ Act of March, 23, 1932, C. 90, 47 Stat. 70 and 73.

²⁶ The National Labor Relations Act, Act of July 5, 1935, C. 3725, 149 Stat. 499.

²⁷ Justice Jackson, dissenting opinion, *Hunt v. Crumbach* (1945), 325 U.S. 821.

²⁸ The Labor Management Relations Act, Chapter 120, Public Law, 101.

Section 1 of the National Labor Relations Act has found, as a basis for that statute, that the national welfare had been adversely affected by several stated malpractices of management in its dealings with labor. Section 1, of the Taft-Hartley Act restated those findings on the basis of evidence considered by Congress, finding that both labor and management were guilty of acts in their relationship to each other which necessitated mutual regulation in the public interest.²⁹ The industrial strife and disruption of the national economy which led to this finding of dual responsibility and blame are briefly summarized in the reports which accompanied the Senate and House Bills and the conference committee's report at the adoption of the Taft-Hartley Act of 1947.

Section 7 of the Taft-Hartley Act prohibits the narrowly defined closed shop, and Section 8(3) permits a union shop subject to certain conditions. Section 13(b) supplements these sections by providing:

“(b) Nothing in that Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial Law.”³⁰

²⁹ “During the last few years the effects of industrial strife have at times brought our country to the brink of a general economic paralysis. Employees have suffered; employers have suffered; and above all the public has suffered. The enactment of comprehensive legislation to define clearly the legitimate rights of employers and employees in their industrial relations in keeping with the protection of the paramount public interest is imperative.” House of Representatives, 80th Congress, First Session, Report No. 245 (Accompanying HR 3020).

“We have felt that on the record before us the abuses of the system have become too serious and numerous to justify permitting present law to remain unchained. . . . Numerous examples were presented to the Committee of the way union leaders have used closed shop devices as a method of depriving employees of their jobs and in some cases a means of securing a livelihood in their trade or calling for purely capricious reasons.” Senate, 80th Congress, First Session (Report No. 105.)

³⁰ The possible need for supplemental state legislation, based on the actual administration of the Taft-Hartley Act, was revealed by the chief administrative officer of the National Labor Relations Board, General

The Committee on Education and Labor explained this provision to the House as follows: ". . . by section 13 the United States expressly declares the subject of compulsory unionism one that the States may regulate concurrently with the United States, notwithstanding that the agreements affect commerce, and notwithstanding that the State laws limit compulsory unionism more drastically than does Federal Law."³¹

The report of the Senate Committee on Labor and Public Welfare³² discusses the Committee's findings and the evidence adduced by it which led to the enactment of the provisions referred to above. Those findings are so pertinent to the reasonableness and relevancy of the North Carolina

Counsel Robert N. Denham, in a speech to the St. Louis Bar Association on November 3, 1947. In discussing the growth of bootleg contracts for union or closed shops made in defiance of the Taft-Hartley Act, Mr. Denham stated: "At this point, it also might be well to invite your attention to a situation which has arisen on many occasions since August 22. That is, there have been occasions when employers have enjoyed satisfactory relations with the union in their plant. The contract has expired since August 22, and the union and the employer are attempting to negotiate a new contract. There is no question of recognition involved, because the employer is quite willing to recognize the union and realizes that it does, in fact, represent a majority of his employees. But the union insists that the new contract contain a union shop provision. Let us assume that the union is one which has not complied with the requirements concerning filing certain data with the Secretary of Labor and certain affidavits of its officers with the National Labor Relations Board. In short, the union is not in a position where it can request the Board to conduct the usual union shop election. Nevertheless, the employer in seeking to maintain his relations with the union, accedes to the union's demands and executes a contract with the union shop provision in it without the required election among the employees; The National Labor Relations Board can not prevent such a contract and there is nothing inherently illegal in it, but it does not afford either the union or the employer any protection, because, if the employer should discharge an employee at the insistence of the union for having lost his good standing with the union, even if it should be for nonpayment of dues, such a discharge would constitute an unfair labor practice and the employer could expect that if charges were filed, he would be ordered to reinstate the employee; he might be ordered to make the employee whole for back pay loss, or the union, in such circumstances, might be required to make the employee whole out of its funds."

³¹ House Report, 245, 80th Cong., 1st Sess. at P. 34.

³² Senate Report, 105, 80th Cong., 1st Sess. PP. 5, 6, and 7.

"Right to Work Statute" that it behooves us to quote at length from the report.

"A controversial issue to which the committee has devoted the most mature deliberation has been the problem posed by compulsory union membership. It should be noted that when the railway workers were given the protection of the Railway Labor Act, Congress thought that the provisions which prevented discrimination against union membership and provided for the certification of bargaining representatives obviated the justification for closed-shop or union shop arrangements. That statute specifically forbids any kind of compulsory unionism.

The argument has often been advanced that Congress is inconsistent in not applying this same principle to the National Labor Relations Act. Under that statute a proviso to section 8(3) permits voluntary agreements for compulsory union membership provided they are made with an unassisted labor organization representing a majority of the employees at the time the contract is made. When the committees of the Congress in 1935 reported the bill which became the present National Labor Relations Act, they made clear that the proviso in section 8(3) was not intended to override State laws regulating the closed shop. The Senate committee stated that 'the bill does nothing to facilitate closed-shop agreements or to make them legal in any State where they may be illegal' (S. Repr. No. 573, 74th Cong., 1st sess., p. 11; see also H. Rept. No. 1147, 74th Congress., 1st sess., pp. 19-20). Until the beginning of the war only a relatively small minority of employees (less than 20 per cent) were affected by contracts containing any compulsory features. According to the Secretary of Labor, however, within the last 5 years over 75 per cent now contain some form of compulsion. But with this trend, abuses of compulsory membership have become so numerous there has been great public feeling against such arrangements. This has been reflected by the fact that in 12 States such agreements have been made illegal either

by legislative act or constitutional amendment, and in 14 other States proposals for abolishing such contracts are now pending. Although these regulatory measures have not received authoritative interpretation by the Supreme Court (see *A. F. of L. v. Watson*, 327 U. S. 582), it is obvious that they pose important questions of accommodating Federal and State legislation touching labor relations in industries affecting commerce (*Hill v. Florida*, 325 U. S. 538; see also, *Bethlehem Steel Co. v. N. Y. Labor Board*, decided by the Supreme Court, April 7, 1947.) In testifying before this committee, however, leaders of organized labor have stressed the fact that in the absence of such provisions many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost.

"The committee has taken into consideration these arguments in reaching what it considers a solution of the problem which does justice to both points of view. We have felt that on the record before us the abuses of the system have become too serious and numerous to justify permitting present law to remain unchanged. It is clear that the closed shop which requires pre-existing union membership as a condition of obtaining employment creates too great a barrier to free employment to be longer tolerated."

At this writing 15 States have been called to our attention in which laws have been adopted prohibiting closed shops, either by constitutional amendment or by legislative act.³³ The provisions of this legislation are comparable or substantially similar to Chapter 328.³⁴ Great weight must be attached to the fact that so many separate jurisdictions have, within a short space of time, seen fit to exercise their police power in the same manner and for the same purposes. The composite will of such a broad

³³ In Arizona, Arkansas, Florida and Nebraska constitutional amendments of that character have been recently adopted.

³⁴ Such statute have been enacted in Delaware, Georgia, Louisiana, Tennessee, Texas, Virginia, and Iowa.

cross section of our country cannot be lightly discarded as unreasonable, arbitrary or capricious or lacking in substantial relationship to its objective. "Since government is not an exact science, prevailing public opinion concerning the evils and the remedy is among the important facts deserving consideration; particularly, when the public conviction is both deep-seated and widespread and has been reached after deliberation."³⁵

The appellants contend that Chapter 328, together with Chapter 75 of the General Statutes, constitutes class legislation and is discriminating so as to deny them equal protection as guaranteed by the Fourteenth Amendment of the Federal Constitution and Article I, Sec. 17, of the State Constitution. The nature of the employer-employee relationship has itself long been recognized as constitutional justification for legislation applicable only to persons in that relative status.³⁶ The only question raised by the plea of discrimination is whether the statute applies alike to all employers and to all employees within its scope who may be found situated in like circumstances and conditions.³⁷

Any legislation in exercise of the police power must perforce affect in different degrees persons or groups within its orbit who occupy different economic, social or political positions with reference to the ends sought by the legislation. Thus Chapter 328 may enable a non-union workman to obtain a "free ride" by receiving benefits attained through the expense and efforts of union workmen, but neither this nor other illustrations which might be given of the variable incidences of the statute upon persons differently circumstanced can render the Act discriminatory. Chapter 328 is geographically co-extensive with the State of North Carolina and its provisions are applicable with the same force to all employers within those boundaries just as they are applicable to all employees therein. It is difficult

³⁵ Justice Brandeis, dissenting opinion, *Truax v. Corrigan*, supra, p. 3. See also *Muller v. Oregon*, 208 U. S. 412.

³⁶ *New York Central Railroad Co. v. White*, 243 U. S. 188.

Arizona Employers Liability case, 250 U. S. 400. *Second Employers Liability Case*, 223 U. S. 1. *Mullen v. Oregon*, supra.

³⁷ *Barbier v. Connolly*, 113 U. S. 27. *Hayes v. Missouri*, 120 U. S. 68.



to see how, within the scope of its authority, the statute could be more uniform in its application.

We can see no merit in the appellants' proposition that Chapter 328 violates the Fourteenth Amendment by abridging the rights of free speech and assembly guaranteed by the First Amendment. That argument has been used successfully against a certain type of legislation restricting union activity. The Supreme Court of the United States in *Thornhill v. Alabama*, *supra*, held that a state statute prohibiting peaceful picketing was void as infringing upon the natural rights secured by the First Amendment. A like result was reached in *Thomas v. Collins*, 323 U. S. 516, with respect to a state statute requiring procurement of an organization card as a prerequisite to the solicitation of workmen to join a union. However, Chapter 328 bears no resemblance to that type of statute. On the contrary, it seems to us that Chapter 328 may serve to secure the rights of free speech and assembly to all persons concerned. The statute protects the rights of workmen to organize; it further protects rights of workmen to express their individual opinions by refusing to join unions. The right of either side, or any faction of any side, to a labor controversy to assemble and publicize its own ideas remains inviolate.

The essence of the courts' decision in *Thornhill v. Alabama*, is contained in the following statements of Mr. Justice Murphy at pages 102 and 103 of the opinion: "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. . . . Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern society." Mr. Justice Rutledge, speaking for the Court in *Thomas v. Collins*, stated at page 532, "The right to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as a part of free speech, but as a part of free assembly." Regardless of how salutary the net result of a closed shop agreement may be, it seems patent to us that the freedom of discussion and dissemination of

ideas by all concerned in labor disputes are more restricted by such agreements than by a statute which stresses individual initiative and liberties by prohibiting the use of union membership or the absence thereof as a condition of employment.

The General Assembly of North Carolina has attempted to draw upon the residual powers of the State in an effort to remedy a situation of economic instability which has alarmed thinking people throughout the country. Those efforts have culminated in a prohibition upon the use of union membership or the absence of union membership as a condition of employment or continued employment. Substantially the same result has been reached in many other state forums which have considered the problem and also to a limited degree by the Congress of the United States.³⁸ In one of those States, Florida, the people adopted a Constitutional Amendment having the same purpose and effect as Chapter 328. A three judge Federal District Court held the amendment valid exercise of State police power.³⁹

State laws similar to Section 4 which outlaw "yellow dog contracts" were first ruled unconstitutional;⁴⁰ but are now regarded as valid.⁴¹ The appellants have not questioned the constitutionality of Section 4. They contend, on the contrary, that such a provision outlawing contracts requiring abstinence from union membership should be held constitutional and that a contrary result should be reached

respecting the corollary provisions of Sections 2, 3, and 5

³⁸ See: The Labor Management Relations Act, discussed *supra*.

The Railway Labor Act, Act of May 20, 1926 C. 347, 44 Stat. 577; as amended by Act of June 21, 1934, C. 691, 48 Stat. 1185; Act of April 10, 1936, C. 166, 49 Stat. 1189, among other things, prohibits closed shop or "yellow dog" contracts in the labor relations of railroads and airplanes and their employees. The constitutionality of the Statute has been broadly sustained. *Shields v. Utah Idaho Cent. R. Co.*; 305 U. S. 177; *Virginia Ry. Co. v. System Federation No. 40*, 300 U. S. 515.

³⁹ *American Federation of Labor v. Watson*, 6 F. Supp. 1010, reversed in 327 U. S. 582, on the grounds that the Florida Amendment has not been interpreted by the highest court of Florida.

⁴⁰ *Coppage v. Kansas*, 236 U. S. 1.

⁴¹ C: *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1; *Phelps-Dodge Corp. v. NLRB*, 313 U. S. 177.

prohibiting union membership from being made a requisite of employment. We cannot accept this view. In either instance, the state is merely delineating the area within which two factions with largely conflicting aims may wage their disputes without transgressing the public welfare. If the State may say to the employer, "you cannot deny work to anyone because of his membership in a union," we think it follows, *a fortiori*, that the state may say to the parties, "you cannot deny work to anyone because he is not a member of a union."⁴²

We are not called upon here to determine the wisdom of the Legislature's action in adopting Chapter 328. Our sole concern must be whether the Legislature has acted within the limitations imposed upon it by the Fourteenth Amendment to the Federal Constitution and Article I, Section 17, of the State Constitution.⁴³ In determining that question we believe that Article I, Section 17, should be viewed in the same light Justice Holmes regarded the Fourteenth Amendment: "There is nothing I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious to me and those whose judgment I respect."

⁴² "Accordingly, decision here has recognized that employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty. . . . The Constitution protects no less the employees converse right. Of course espousal of any other lawful cause. It is entitled to the same protection." Thomas v. Collins, *supra*.

⁴³ "The wisdom or lack of wisdom of a state statute or of a provision in a state constitution is not a matter for the courts. The people, through their representatives in the Legislature and through their vote for an amendment to their constitution, have the right to commit folly if they please, provided it is not prohibited by the Federal Constitution or antagonistic to Federal statutes authoritatively enacted concerning the matter involved. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands." American Federation of Labor v. Watson, *supra*.

While, perhaps, we do not share the resentment expressed by the great Jurist, we may point out that the Congress seems to have made clear its intention to recognize as valid the particular experiment inaugurated by Chapter 328.

In summary, the case, stripped to decisional factors, falls into simple lines. The power of the State by general legislative Act, in the exercise of its police power, to condemn private contracts found to be injurious to the public welfare, to declare them contrary to public policy and prevent their consummation cannot be denied. Exercised within constitutional limitations, it is both a necessary and a salutary function of government, the exercise of which is not infrequently an exigent duty. Within those limitations the occasion justifying the exercise of the power is within the legislative discretion, provided only that its action is not arbitrary or capricious and has a reasonable relation to the end sought to be accomplished.

The rights of property guaranteed by our Constitution are necessarily relative to those held by others under the same Constitutional sanctions. The right of contract, whether considered as natural or merely civil, is a property right; certainly of no greater dignity than the right to work, ordinarily regarded as inalienable; and it cannot be unrestrictedly used to the injury of another. Under such circumstances the exercise of the State's police power in its regulation is not a violation of Due Process required by the Fourteenth Amendment. We cannot find that the legislature exceeded its powers. The General Assembly felt that it could no longer avoid the issue of the closed shop; and probably felt that so far as it concerned the principle which it felt should be preserved there is no substantial difference between the "closed shop" and the so-called "all union shop." We cannot say that the matter was not a proper subject of governmental regulation or that government has become so ensnared in its own charter as to be forced to admit its impotency.

Being of that opinion we further conclude that the record does not disclose error which would justify us in disturbing the result of the trial. We find no error.

No Error.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 660

GEORGE WHITAKER, A. M. DEBRUHL, T. G. EMBLER, H. E. SETZER, J. E. ROGERS, FRED BLACK
AND R. B. ROBERTSON,

vs.

STATE OF NORTH CAROLINA

APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA

**STATEMENT AGAINST JURISDICTION AND MOTION
TO DISMISS OR AFFIRM**

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Assistant Attorney General,

Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 660

GEORGE WHITAKER, A. M. DEBRUHL, T. G. EMBLER, H. E. SETZER, J. E. ROGERS, FRED BLACK
AND R. B. ROBERTSON

vs.

STATE OF NORTH CAROLINA

STATEMENT AGAINST JURISDICTION

The State of North Carolina, the appellee in this appeal from the Supreme Court of North Carolina, files herewith a statement of matters and grounds making against the jurisdiction of this Court as provided by Rule 12 of this Court.

The appellant primarily relies upon three asserted violations of the Constitution of the United States by Sections 2, 3 and 5 of the North Carolina statute regulating contracts of labor organizations. (Chapter 328 of North Carolina Session Laws of 1947.) These will be considered in this statement substantially in the order appearing in appellant's discussion of the nature of the case and argument as to the existence of Federal Questions.

The appellee submits that the questions on which the decision of this case depends are so unsubstantial as not to need further argument.

I

The basic question in this case involves the constitutional authority of the General Assembly of North Carolina to regulate contracts of employment between employers and employees in the interest of public welfare. The North Carolina statute does not prohibit contracts between employers and employees as to wages, hours and working conditions; it does not prohibit collective bargaining, the formation of trade unions, nor does it prohibit union agreements between trade unions and employers. The statute does not authorize the use of injunctions or other legal instrumentalities which now, as well as in the past, have been so odious to and condemned by trade unions. The statute in substance says that an employer, as a condition of employment or, continuation of employment, cannot: (a) require a person to become or remain a member of a labor union; (b) require a person to pay any dues, fees or charges to a labor union; (c) require a person to abstain or refrain from membership in any labor union.

If these statutory regulations fall within the scope of the police power of the State, then appellants' contentions as to a violation of the due process and equal protection clauses of the Fourteenth Amendment must fail.

The law to be applied in this case is not the subject of any serious debate. The parties apparently agree as to what has been decided. The appellant cites decisions of this Court upon which we equally rely. Actually the only question they present is whether social and economic conditions in North Carolina were such as to have afforded the General Assembly of this State "any reasonably conceivable circumstances" for enacting the legislation and

“that there is an actual relation between the means and the end.”

It would seem there could be but one answer to this question. The opinion of the Supreme Court of North Carolina demonstrates this so conclusively it cannot be reasonably challenged. We are content to rely upon Mr. Justice Seawell's comprehensive statement as to this: Closed shop and other forms of union security contracts occupied the center of the stage of national issues confronting the American people at the time the North Carolina Act was passed. It is idle to say that there was only one side to this question.

It is clearly within the police power of a state “to set the limits of the permissible contest open to industrial combatants,” modify the rights of employers and employees to conduct their own affairs in the interest of the public, and prescribe regulations relating to employment contracts.

West Coast Hotel Co. v. Parrish, 300 U. S. 379, 57 S. Ct. 578;

Phelps Dodge Corp. v. N. L. R. B., 313 U. S. 177, 61 S. Ct. 845;

Thornhill v. Alabama, 310 U. S. 88, 60 S. Ct. 736;

Carpenter's etc. Union v. Ritter's Cafe, 315 U. S. 722;

11 *Am Jur.* 1171.

The constitutional authority to restrict freedom of contract between employers and employees is supported by many illustrative cases.

Holden v. Hardy, 169 U. S. 366, 18 S. Ct. 383;

Knoxville Iron Co. v. Harbison, 183 U. S. 13, 22 S. Ct. 1;

Patterson v. The Bark Eudora, 190 U. S. 169, 23 S. Ct. 821;

McLean v. Arkansas, 211 U. S. 539, 29 S. Ct. 206;

Chicago, B. & Q. R. R. Co. v. McQuire, 219 U. S. 549, 31 S. Ct. 259;

Bunting v. Oregon, 243 U. S. 426, 37 S. Ct. 435;

New York Central R. R. Co. v. White, 243 U. S. 188, 37 S. Ct. 247;

State v. Justus, 85 Minn. 279, 88 N. W. 759;

People v. Washburn, 285 Mich. 119, 280 N. W. 132;
(Appeal denied, 305 U. S. 577; 59 S. Ct. 355.)

The prohibition of the so-called "closed shop" or union shop relates only to incidents or some provisions of a union contract with an employer. It is, therefore, a regulation of some of the features of contracts in this field.

A closed shop cannot be regulated within itself and still retain any semblance of the type of closed shop possessing the preferential qualities that appellants wish to retain. The fact that the closed shop has an historic growth or evolution does not exempt it from suppression for the public welfare. Prescription does not prevail in this field; and if it did, none of the remedial legislation as to hours, wages, working conditions would now be in existence. This is likewise true as to other legislation favoring unions. Union security cannot and should not prove to be a shelter from the police power of a state any more than the maintenance of high corporate profits by means of combinations or agreements in restraint of trade.

The power to regulate contracts in the employer-employee field having been established by many decisions and, indeed, conceded by appellants, if there is a rational basis in the public interest, there remains only the question of the occasion or conditions justifying the use of the power.

The appellants apparently contend that a rational basis having a reasonable relation to the end sought to be accomplished must be established by factual data presented to the Court. This data, it is said, must be of an economic and sociological character. Reduced to its lowest terms, this is nothing but the doctrine that the court should decide

constitutional questions, independent of and aside from legislative judgment, upon the opinions of economists and sociologists. In other words, the court should re-examine the wisdom of the Legislature. Supporting presumptions apparently should be disregarded, and decided advantage should be accorded to the party presenting the most plausible economic brief. If the statute is within the scope of the police power, the legislative enactment should be upheld even though subsequent events prove the statute to be a misguided experiment. Any other theory can convert a grant of powers to the Federal Government and the reserved powers of the people of a State into a complete nullification of the police power of a State.

Appellee does not contend that the legislative determination is final, but it is asserted that judicial review is limited; and if "it can be seen that in any degree, or under any reasonably conceivable circumstances, there is an actual relation between the means and the end," the requirement to sustain judicial approval has been met. On this view, it is stated: "The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance."

Stated in other terms by this Court:

"Being a legislative judgment it is presumed to be supported by facts known to the legislature unless facts judicially known or proved preclude that possibility. Hence, in reviewing the present determination, we examine the record not to see whether the findings of the Court below are supported by the evidence, but to ascertain upon the whole record whether it is possible to say that the legislative choice is without rational basis."

Stephenson v. Binford, 287 U. S. 251, 272;

Eric R. R. Co. v. Williams, 233 U. S. 685, 699;

Clark v. Paul Gray, Inc., 306 U. S. 583, 594;

South Carolina Highway Dept. v. Barnwell Bros.
303 U. S. 477;

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Arizona Copper Co. v. Hammer, 250 U. S. 400;
Standard Oil Co. v. Marysville, 279 U. S. 582;
Gant v. Oklahoma City, 289 U. S. 98;
Bayside Fish Flour Co. v. Gentry, 297 U. S. 422.

II

As to the equal protection of the law clause of the Fourteenth Amendment, as pointed out in the opinion of the Supreme Court of North Carolina in this case (288 N. C. 352, 368; 45 S. E. (2d) 860, Advanced Sheet, No. 8), the employer-employee relationship has long been recognized as constitutional justification for legislation applicable to persons in that relative status. The North Carolina statute applies equally and alike to all employers and to all employees who are situated in like circumstances and conditions. Section 4 of the North Carolina statute, which the appellants do not contest, specifically prohibits any employer to require an employee to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment. The fact that non-union employees may indirectly benefit from the activities of union employees does not render the statute discriminatory. The Act is equally applicable to all employers and employees within the State.

Barbier v. Connolly, 113 U. S. 27;

Hayes v. Missouri, 120 U. S. 68;

III

The Supreme Court of North Carolina, in a carefully stated and well-written opinion in this case (228 N. C. 352, 368; 45 S. E. (2d) 860, Advanced Sheet No. 8), has examined all of these questions and resolved them against the appel-

lants. The footnotes to the opinion show that the Court, speaking through Mr. Justice Seawell, carefully went into the history of the closed shop, both in England and in the United States. The opinion brings within its scope the investigations and examinations made by the Congress in connection with the National Labor Relations Act, the Railway Labor Act and the Labor-Management Relations Act. The opinion shows, beyond all doubt, that all of these Federal Acts recognize limitations upon the closed shop; and the Labor Relations Act of 1935, as amended, while it authorized union shop agreements, the Act specifically stated that nothing contained in the Act would permit such agreements in States under whose laws they were illegal. The Labor-Management Relations Act shows that the Congress specifically recognized the type of law contained in the North Carolina statute and that as to this phase of the matter, the State could legislate in the same field without nullification by the Federal Act. The opinion further shows that it is based upon factual data of an economic or sociological nature such as is contended for by appellants. The Supreme Court of North Carolina, therefore, having acted upon and considered the case in conformity with the rules of this Court, and this type of legislation being clearly within the police power of the State and the Supreme Court of North Carolina having found that the Legislature acted within its discretion and upon a rational basis for the purpose of alleviating evils and protecting the public welfare, it is, therefore, contended by appellee that no substantial Federal questions have been raised warranting an examination by the Supreme Court of the United States based upon any alleged infringement of the Fourteenth Amendment.

IV

As pointed out in the opinion of the Supreme Court of North Carolina, the statute does not, in any manner, impair the right of either side, or any faction of any side, to a labor controversy to assemble and publicize its own ideas. As further pointed out, the North Carolina statute protects the right of employees to organize and protects their individual opinions by allowing them to refuse to join a trade union. There is, therefore, no infringement of the Fourteenth Amendment as to the rights of free speech and assembly as guaranteed by the First Amendment.

V

At the time of the issuance of the opinion of the Supreme Court of North Carolina, fifteen States had adopted laws prohibiting closed shops either by constitutional amendment or by legislative act. The same problem has had a limited consideration by the Congress of the United States. The constitutionality of the Railway Labor Act (44 Stat. 577), which prohibits a closed shop or a "yellow dog" contract, has been sustained. See *Shields v. Utah-Idaho R. R. Co.*, 305 U. S. 177 and *Va. Ry. Co. v. System Federation No. 40*, 300 U. S. 515. We, therefore, summarize our position by quoting an excerpt from the opinion of the Supreme Court of North Carolina as follows:

"We are not called upon here to determine the wisdom of the Legislature's action in adopting Chapter 328. Our sole concern must be whether the Legislature has acted within the limitations imposed upon it by the Fourteenth Amendment to the Federal Constitution and Article I, Section 17, of the State Constitution. In determining that question we believe that Article I, Section 17, should be viewed in the same light Justice Holmes regarded the Fourteenth Amendment: 'There is nothing I more deprecate than the use of the Four-

teenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious to me and those whose judgment I respect."

"While, perhaps, we do not share the resentment expressed by the great Jurist, we may point out that the Congress seems to have made clear its intention to recognize as valid the particular experiment inaugurated by Chapter 328.

"In summary, the case, stripped to decisional factors, falls into simple lines. The power of the State by general legislative act, in the exercise of its police power, to condemn private contracts found to be injurious to the public welfare, to declare them contrary to public policy and prevent their consummation cannot be denied. Exercised within constitutional limitations, it is both a necessary and a salutary function of government, the exercise of which is not infrequently an exigent duty. Within those limitations the occasion justifying the exercise of the power is within the legislative discretion, ~~provided only that its action is not~~ arbitrary or capricious and has a reasonable relation to the end sought to be accomplished."

Appellee, therefore, asserts that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

MOTION TO DISMISS OR AFFIRM

For the reasons set out above, the appellee submits that the questions on which the decision of this case depends are so unsubstantial as not to need further argument. All of the constitutional questions raised by this appeal have been thoroughly argued, examined and decided in the Supreme Court of North Carolina. There are, therefore, no substantial grounds upon which this Court should assert its jurisdiction or should find that substantial Federal questions are at issue.

Therefore, the appellee respectfully moves the Court that this appeal be dismissed or affirmed.

HARRY McMULLAN,
Attorney General of North Carolina,

RALPH MOODY,
Assistant Attorney General.

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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1948

Number 27

AMERICAN FEDERATION OF LABOR, ARIZONA STATE FEDERATION OF LABOR, PHOENIX BUILDING AND CONSTRUCTION TRADES COUNCIL, ET AL., APPELLANTS,

V.

AMERICAN SASH & DOOR COMPANY, D. A. BREWER, W. B. STEVENS, ET AL.

Appeal from the Supreme Court of the State of Arizona

Number 47

LINCOLN FEDERAL LABOR UNION NO. 19129, AMERICAN FEDERATION OF LABOR, NEBRASKA STATE FEDERATION OF LABOR, ET AL., APPELLANTS,

V.

NORTHWESTERN IRON AND METAL COMPANY, DAN GIEBELHOUSE, STATE OF NEBRASKA AND NEBRASKA SMALL BUSINESS MEN'S ASSOCIATION.

Appeal from the Supreme Court of the State of Nebraska

Number 34

GEORGE WHITAKER, A. M. DEBRUHL, T. G. EMBLER, ET AL., APPELLANTS,

V.

STATE OF NORTH CAROLINA,

Appeal from the Supreme Court of North Carolina

BRIEF OF APPELLEES, NORTHWESTERN IRON & METAL COMPANY, AND DAN GIEBELHOUSE.

LOUIS B. FINKELSTEIN,

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and Dan Giebelhouse, Appellees.*

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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1948

Number 27

AMERICAN FEDERATION OF LABOR, ARIZONA STATE FEDERATION OF LABOR, PHOENIX BUILDING AND CONSTRUCTION TRADES COUNCIL, ET AL., APPELLANTS.

V.

AMERICAN SASH & DOOR COMPANY, D. A. BREWER, W. B. STEVENS, ET AL.

Appeal from the Supreme Court of the State of Arizona.

Number 47

LINCOLN FEDERAL LABOR UNION NO. 19129, AMERICAN FEDERATION OF LABOR, NEBRASKA STATE FEDERATION OF LABOR, ET AL., APPELLANTS,

V.

NORTHWESTERN IRON AND METAL COMPANY, DAN GIEBELHOUSE, STATE OF NEBRASKA AND NEBRASKA SMALL BUSINESS MEN'S ASSOCIATION.

Appeal from the Supreme Court of the State of Nebraska.

Number 34

GEORGE WHITAKER, A. M. DEBRUHL, T. G. EMBLER, ET AL., APPELLANTS,

V.

STATE OF NORTH CAROLINA.

Appeal from the Supreme Court of North Carolina.

BRIEF OF APPELLEES, NORTHWESTERN IRON & METAL COMPANY, AND DAN GIEBELHOUSE.

♦LOUIS B. FINKELSTEIN,

*Attorney for Northwestern Iron & Metal Co.,
and Dan Giebelhouse, Appellees.*

OPINION BELOW.

The opinion of the Supreme Court of the State of Nebraska (No. 47) (R. 52-78), is reported under the name of *Lincoln Federal Labor Union No. 19129 v. Northwestern Iron and Metal Company, et al.*, 149 Neb. 507, 31 N. W. (2d) 477.

JURISDICTION.

The appellants, in paragraph 35 of their petition (R. 16-20) filed in the District Court of Lancaster County, Nebraska, summarized the Federal questions involved and alleged that Sections 13, 14, and 15 of Article XV of the Constitution of the State of Nebraska violated the following provisions of the Constitution of the United States of America as amended.

a. The ~~F~~irst Amendment of the Constitution of the United States.

b. The Fourteenth Amendment of the Constitution of the United States.

c. Article I, Section 10 of the Constitution of the United States.

d. Article VI. of the Constitution of the United States.

e. Title 29, Sections 151 to 166 of the United States Code Annotated, known as the National Labor Relations Act.

By reason of the allegations above set forth, the jurisdiction of this court is invoked under Section 237 of the Judicial Code as amended (28 U. S. C. A. 344). On May 24, 1948, this court noted probable jurisdiction (R. 86).

STATEMENT OF THE CASE.

On July 26, 1946, the Northwestern Iron and Metal Company, a corporation with its principal place of business in Lincoln, Nebraska, and the Lincoln Federal Labor Union, No. 19129, entered into a written agreement (R. 31-37), which among other things contained the following provision: "* * * Whenever any employee shall cease to be a member in good standing with the union, and when the union shall have given written notice to that effect, the company agrees to discharge said employee from its services at the end of the work week after said notice of failure to maintain good standing in the union is received" (R. 33).

The people of the State of Nebraska, on November 5, 1946, by a sufficient majority, adopted a constitutional amendment which was proclaimed by the Governor of the State of Nebraska as effective on December 11, 1946.

This constitutional amendment was designated as Sections 13, 14, and 15 of Article XV of the Constitution of the State of Nebraska.

The amendment is as follows:

"Section 13.

"No person shall be denied employment because of membership in or affiliation with, or resignation or expulsion from a labor organization or because of refusal to join or affiliate with a labor organization; nor shall any individual or corporation or association of any kind enter into any contract, written or oral, to exclude persons from employment because of membership in or non-membership in a labor organization.

"Section 14:

"The term, 'Labor organization' means any organization of any kind, or any agency or employee representation committee or plan, which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

"Section 15:

"This Article is self-executing and shall supersede all provisions in conflict therewith; legislation may be enacted to facilitate its operation but no law shall limit or restrict the provisions hereof." (R.15-16)

On February 10, 1947, the appellant, Lincoln Federal Labor Union No. 19129, gave written notice to the defendant, Northwestern Iron and Metal Company, a corporation, that Dan Giebelhouse, one of the employees of the Northwestern Iron and Metal Company, and a member of the Lincoln Federal Labor Union No. 19129, had ceased to be a member in good standing with the Lincoln Federal Labor Union No. 19129, and asked that the Northwestern Iron and Metal Company discharge said employee from the services of said company, pursuant to the provision of the contract entered into between Lincoln Federal Labor Union No. 19129 and Northwestern Iron and Metal Company as above set forth.

Upon receipt of said written notice the appellee, Northwestern Iron and Metal Company, notified the appellant, Lincoln Federal Labor Union No. 19129, that it refused to discharge the said Dan Giebelhouse because in doing so it would violate Sections 13, 14 and 15 of Article XV of the Constitution of the State of Nebraska, which was at said time in full force and effect.

The appellants herein then filed a suit of a civil nature to obtain a declaratory judgment as to the legality of Sections 13, 14 and 15 of Article XV of the Constitution of the State of Nebraska. Said appellants claimed that the above sections of the Constitution of the State of Nebraska violated certain provisions of the Constitution of the United States as amended. Said petition also prayed for certain equitable relief (R. 1-20).

The appellee, Northwestern Iron and Metal Company, Dan Giebelhouse (R. 41) and Nebraska Small Businessmen's Association (R. 40), filed a motion for a judgment on the pleadings. The appellee, the State of Nebraska, filed a demurrer (R. 40). The motion of the appellee, Northwestern Iron and Metal Company, and Dan Giebelhouse contained the following:

"Wherefore these moving defendants move that the court enter a judgment in this case declaring, finding and adjudging that:

"1. The said Amendment to the Constitution of the State of Nebraska adopted by the vote of the people of said State on November 5, 1946, and proclaimed by the governor to be in full force and effect on December 12, 1946, and fully set forth in Paragraph 32, Pages 15 and 16 of plaintiffs' petition is valid and binding and does not contravene any provisions in the Constitution of the United States of America.

"2. That the said Constitutional Amendment of the State of Nebraska does not contravene and does not deny to the plaintiffs the rights guaranteed in the First Amendment to the Constitution of the United States.

"3. That the said Constitutional Amendment of the State of Nebraska does not contravene and does

not deny to the plaintiffs the rights guaranteed by Article I, Section 10 of the Constitution of the United States.

"4. That the said Constitutional Amendment of the State of Nebraska does not contravene and does not deprive the plaintiffs of any of the rights guaranteed to said plaintiffs in the National Labor Relations Act, Title 29, Sections 151-166, inclusive, United States Code Annotated, and does not violate the public policy and laws of the United States to prevent any sort of discrimination in employer and employee relationships.

"5. That the said Constitutional Amendment of the State of Nebraska does not contravene and does not deny any of the rights guaranteed to the plaintiffs in Article VI of the Constitution of the United States.

"6. That the said Constitutional Amendment of the State of Nebraska does not contravene and does not deny to the plaintiffs any of the rights guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

"7. That the said Constitutional Amendment of the State of Nebraska does not constitute class legislation, but is all inclusive to all employers and employees of said state.

"8. That Paragraph 3 of the contract entered into by and between the plaintiff, Lincoln Federal Labor Union #19129 and the defendant, Northwestern Iron and Metal Company, which is set forth in Paragraph 17, page 9 of the plaintiffs' petition, is, since the 12th day of December, 1946, illegal, invalid and unenforceable by reason of the adoption of said Amendment to the State Constitution by the people of the State of Nebraska.

"9. That the costs of this suit be taxed against the plaintiffs." (R.42-43)

On July 7, 1947, Honorable Ralph P. Wilson, one of the judges of the District Court of Lancaster County, Nebraska, entered a declaratory judgment in this action (R. 44-46), sustaining the motions and the demurrer, and held:

3. "that said amendment does not violate nor conflict with provisions of the constitution of the United States.

"4. That the said amendment of the constitution of the State of Nebraska does not conflict with, impair, or contradict any part of the National Labor Relations Act, nor the Labor Management Relations Act, 1947, and does not deprive the plaintiffs (appellants) of any of the rights guaranteed to said plaintiffs by the said acts.

"5. That said amendment is in all respects valid." (R.45).

The motion for a new trial was overruled and the appellants, complying with rules and statutory requirements appealed from said decision to the Supreme Court of the State of Nebraska.

On March 19, 1948, the Supreme Court of the State of Nebraska affirmed the judgment of the district court (R. 52-78).

The appellants appealed from the decision of the Supreme Court of Nebraska to this court, and on May 24, 1948, this court noted probable jurisdiction.

STATEMENT.

At the outset, we want to inform this court that the appellee, Dan Giebelhouse, is no longer employed by the

Northwestern Iron and Metal Company. He left his employment voluntarily. While we believe that this does not make this case moot, yet we want the court to be informed of this fact.

In this brief, I have omitted the question raised by the appellants, that the constitutional amendment to the Constitution of the State of Nebraska, involved in this litigation, is invalid because it conflicts with certain provisions in the National Labor Relations Act commonly known as the Wagner Act. While this action was pending the Labor Management Relations Act, 1947, commonly known as the Taft-Hartley Law, was enacted by the Congress of the United States.

In the brief filed by the appellants in the Supreme Court of the State of Nebraska, they admitted that for the time being at least, the question of the conflict between the constitutional amendment to the Constitution of the State of Nebraska and the National Labor Relations Act, was disposed of by the provisions in the Labor Management Relations Act, 1947.

We feel that that is still a fact. However, in the appellants' brief in this court, reference was made to the National Labor Relations Act. We feel that any contention by the appellants that the amendment to the Constitution of the State of Nebraska, involved in this litigation, is in conflict with the National Labor Relations Act, is fully and completely answered in the opinion of the Supreme Court of the State of Nebraska (R. 53,58,263), and we refrain from repeating it.

SUMMARY OF ARGUMENT.

The appellees believe that the regulation of employer and employee relationship is a proper subject for state legislation; that such legislation comes within the police power of the state; that the constitutional provision of the Nebraska Constitution under attack does not prohibit the existence of unions, and does not violate any one of the provisions of the United States Constitution as claimed by the appellants. That the constitutional provision under attack is a regulatory one, and tends to regulate the relationship of employer and employee; that all regulations tend to impinge upon some of the rights that parties may have had prior to the regulation; that there can be no regulation without some form of prohibition as to some of the rights that the parties had prior to the regulation.

The appellees believe that the constitutional provision under attack is reasonable and necessary; that the people of the State of Nebraska, by a large majority, voted in favor of this constitutional provision after a full discussion prior to the date that the provision was voted upon; that the constitutional provision under attack does not violate any of the provisions of the Constitution of the United States, and therefore is valid and constitutional.

ARGUMENT.

A General Demurrer Only Admits Facts Well Pleaded.

The appellants claim that all the statements in their petition were admitted by the demurrer and by the motions for judgment filed by the appellees. That is not true in Nebraska. A general demurrer in Nebraska:

● "admits all allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the conclusions of the pleader, except when supported by, and necessarily result from the facts pleaded. It does not admit inferences of the pleader from the facts alleged, nor mere expression of opinion, nor theories of the pleader, nor allegations of the pleader as to what will happen in the future, nor arguments; nor allegations contrary to facts of which allegations judicial notice is taken or which are contrary to law. 41 Am. Jur. Sec. 244, Page 463, Louisville & Nashville R. Co. v. Palmes, 109 U. S. 244, 3 S. Ct. 193, 27 L. Ed. 922."

Johnson v. Marsh, 146 Neb. 257, 19 N. W. (2d) 366, 369, approved in *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 149 Neb. 507, 31 N. W. (2d) 477, 480.

The same is true as to motions for judgment.

This court, therefore, can take into account only the facts in the petition that are issuable, relevant, material and well pleaded. This court must ignore in the petition all inferences of the pleader, all expressions of opinions, all theories of the pleader not supported by and necessarily result from the facts pleaded, all allegations of the pleader as to what will happen in the future, all allegations that are contrary to facts of which judicial notice is taken, or which is contrary to law.

A Court Must Not Concern Itself With the Wisdom of a Legislative Act, or a Constitutional Amendment in Deciding the Constitutionality of the Act or Amendment.

In deciding whether a certain statute or a constitutional provision of a State Constitution conflicts with any

provision of the Federal Constitution, there are several cardinal principles which this court has often stated as a guide:

One of the principles that this court uses in deciding such a matter is that the court cannot concern itself with the wisdom of the act or amendment. The question whether the constitutional amendment is economically sound, or whether it will tend to deprive the union of certain powers that it may obtain through contracts, if this constitutional amendment were not adopted, is of no concern to this court. The wisdom or soundness economically or politically of a constitutional amendment is not within the province of the court.

In the case of *West Coast Hotel Company v. Parrish*, 81 L. Ed. 455, 57 S. Ct. 578, 100 A. L. R. 1330, the court stated:

"The legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection. The adoption of similar requirements by many States evidences a deepseated conviction both as to the presence of the evil and as to the means adopted to check it. Legislative response to that conviction cannot be regarded as arbitrary or capricious and that is all we have to decide. Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment."

The Supreme Court of the United States, in the case of *Stephen v. Binford*, 287 U. S. 251, 77 L. Ed. 288, 87 A. L. R. 721, stated:

"We need not consider whether the act in some other aspect would be good or bad. It is enough to support its validity that, plainly one of its aims

is to conserve the highways. If the legislature had other or additional purposes which, considered apart, it had no constitutional power to make effective, that would not have the result of making the act invalid * * *"

In the case of *Allen-Bradley Local 1111 v. Wisconsin Employment Relations Board*, 295 N. W. 791, the court stated:

"We wish to point out again that the court has no jurisdiction or authority to pass upon the policy involved in this or any other action. Questions of public policy are primarily for the legislature, if the provisions of this act are too restrictive as claimed in the brief. The court may not deal with that feature of the act if it otherwise is within the field of constitutional legislative action. In upholding the law against attacks upon its validity on the ground that it is unconstitutional, the court neither commends nor criticizes the public policy involved. If the act is too restrictive, the remedy lies with the legislature and not with the court."

In the case of *Arizona Copper v. Hammer*, 250 U. S. 400, 63 L. Ed. 1058, 6 A. L. R. 1537, Justice Pitney, in delivering the opinion of the court, in that case stated:

"Some of the arguments submitted to us assail the wisdom and policy of the act because of its novelty, because of its one-sided effect in depriving the employer of defenses, while giving him (as is said) nothing in return, leaving the damages unlimited, and giving to the employee the option of several remedies; as tending not to obviate but to promote litigation; and as pregnant with danger to the industries of the state. With such considerations this court cannot concern itself. Novelty is not a constitutional objection, since, under constitutional forms of government, each state may have a legis-

lative body endowed with authority to change the law. In what respects it shall be changed, and to what extent, is in main confided to the several states; and it is to be presumed that their legislatures, being chosen by the people, understand and correctly appreciate their needs. The states are left with a wide range of legislative discretion, notwithstanding the provisions of the 14th Amendment; and their conclusions respecting the wisdom of their legislative acts are not reviewable by the courts."

In the case of *Lennox v. Housing Authority of the City of Omaha*, 137 Neb. 582, 290 N. W. 451, 291 N. W. 100, Justice Carter stated:

"Much is said in the briefs about the wisdom of this legislation, a subject with which we cannot concern ourselves. The wisdom of legislation is a matter for legislative and not judicial decision."

This court in deciding this case, cannot, and I am sure, will not concern itself with the political and economic wisdom of the constitutional amendment in question. The appellants consumed a considerable portion of their brief in an effort to show that the act is unwise and that it will do considerable harm to the appellants. We feel that the cases cited above, and the very many cases in which the same issue was raised, and which were not cited, clearly show that neither of the above are any criterion as to the validity of the constitutional amendment under attack.

Every Presumption Should be Entered Into by the Court in Favor of the Vaidity of a Constitutional Amondment.

The second, cardinal principle that must be kept in mind in this case is that every possible presumption

should be entered into in favor of the validity of the constitutional amendment. This court, in *National Labor Relations Board v. Jones & Laughlin Steel Company*, 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893, 108 A. L. R. 1352, held:

"The cardinal principle of statutory construction, is to serve and not to destroy, * * * as between two possible interpretations of the statute, by one of which it would be unconstitutional, and by the other valid. Our plain duty is to adopt that which will save the act."

The Supreme Court of the United States, in the case of *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 41 S. Ct. 172, 16 A. L. R. 196, through Justice Brandeis, held:

"All rights are derived from the purposes of the society in which they exist; above all, rights rises duty to the community, the conditions developed in industry, may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for the judges to determine whether such conditions exist, nor is it their function to state the limits of permissible contest and to declare the duties which the new situation demands."

Keeping in mind these two cardinal principles, that it is the duty of the court to save and not to destroy, that all presumptions should be in favor of the constitutionality of an act, not against it, and keeping in mind that the wisdom of an act, whether economically or politically, must not be taken into consideration in adjudging its validity, will eliminate the greater portion of the plaintiff's complaint, as to the validity of the constitutional amendment under attack.

The Constitutional Provision Under Attack is Within the Police Power of the State. It is Reasonable and is Related to the Public Welfare. The Constitutional Provision of the Nebraska Constitution Does Not Violate Any Part of the Constitution of the United States.

The appellants have raised many issues and discussed many questions in their effort to convince this court that the amendment to the Constitution of the State of Nebraska, which has been labeled both "The right to Work" amendment and the "Anti-Closed Shop" amendment, violates several provisions of the Constitution of the United States and therefore is void. I believe, however, that after a careful analysis of the claims of the appellants this court will reach the conclusion that in fact only the two following issues are involved:

1. Is the constitutional amendment in question within the police power of the State?
2. Is it reasonable and does it have a relationship to the public welfare?

If the answer to both issues is in the affirmative then clearly the amendment is constitutional and valid. If, however, the answers to any one of the above two issues is in the negative, then the amendment is unconstitutional and void.

There can be no argument, I believe, that each state has the power and authority to adopt any law or constitutional amendment which properly comes within its police power without any restraint by the Constitution of the United States.

The Supreme Court of the United States, in the case of *Reed v. State of Colorado*, 187 U. S. 137, 148 L. Ed. 108, held:

"It should never be held that Congress intends to supersede, or by its legislation suspend, the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that in the application of the principle of supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together. *Sinnot v. Davenport*, 22 How. 227, 243, 16 L. Ed. 243, 247."

The Supreme Court of the State of Nebraska, in the case of *Placek v. Edstrom*, 148 Neb. 79, 26 N. W. (2d) 489, held:

"No provision of the constitution of the United States has ever intended to take from the States the right to properly exercise their police powers which generally extend to all the great public needs which are lawfully recognized as immediately necessary to promote the general welfare."

Likewise, the Supreme Court of the State of Minnesota, in the case of *Abeln, et al. v. City of Shakopee, et al.*, 28 N. W. (2d) 642, stated:

"The states were not deprived of their police power by the Federal Constitution as originally adopted and no restraints were imposed upon such power by the adoption of the XIV Amendment."

Admitting that this state has authority to adopt any act which comes within its police power, the next ques-

tion that presents itself is whether the constitutional amendment attacked does come within the police power of the state.

That the relationship between the employer and employee is of great public interest is now axiomatic. This relationship affects the health, the wealth, and the welfare of the citizens of the community, of the state and of the nation.

In the case of *Thomas v. Collins*, 323 U. S. 516, 532, 89 L. Ed. 430, the Supreme Court of the United States held:

"That the State has power to regulate labor unions with a view to protecting the public interest, is, as the Texas Court said, hardly to be doubted. They cannot claim special immunity from regulation."

Prior to the turn of this century with the sparsely populated communities, with industries just beginning to expand, with distant travel limited by the crude locomotive of that day and local travel limited by horse and buggy, when labor was poorly organized, it could have been forcefully argued that the relationship between the employer and the employee were purely a private matter between the contracting parties and that government had no right to interfere. In fact the majority of the court decisions of that day so held. However, with our rapid mechanical development which has brought about large industry, with our present state and federal labor laws, that concept has changed. Today when a shut down in a single industry in any part of the United States can and usually does affect almost every citizen in the entire country. When a strike by the miners stops in-

dustry everywhere. When the shut down of electrical power, due to a labor dispute, deprives the entire country of light and of all the other uses to which electric power is now put to in the home, schools, hospitals and industry. When there is employer and employee disturbance in any field, and in any locality, the entire nation suffers. Then there can be no question that the relationship of employer and employee is virtually the interest of every citizen, is of great public interest, and its control comes within the domain of the police power of the state.

Both the state and federal governments have for some time recognized this fact and a considerable amount of legislation has been adopted to regulate the relationship between the employer and the employee.

The various acts by our Federal Government in this field are too numerous to mention. The following are a few of them:

The Railway Labor Act was passed in 1926 and amended in 1934. In that act the union shop or closed shop is prohibited.

In 1932 the Norris-LaGuardia Anti-Injunction Act was adopted.

In 1938 the Fair Labor Standards Act became effective.

In 1935 the National Labor Relations Act, known as the Wagner Act, was adopted.

In 1947 the Labor Management Relations Act, 1947, known as the Taft-Hartley Act, was adopted.

In each of the above, certain rights that both the employer and employee had were curtailed. Some of these rights were either regulated or entirely taken away.

Prior to the adoption of the Fair Labor Standards Act the question of the wages and hours was purely a matter between the employer and employee. After the adoption of the Act that is no longer true. These rights were taken away from both the employer and employee and neither may contract contrary to the provisions of that Act.

Prior to the adoption of the National Labor Relations Act the right to hire and fire was exclusively in the employer. An employer could hire whomever he wanted and could discharge him at any time without cause, or for any cause. After the adoption of the National Labor Relations Act that right has been limited.

In the case of *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 85 L. Ed. 753, 61 S. Ct. 845, 133 A. L. R. 1217, 1222, Justice Frankfurter, writing the opinion for this court, stated:

"We have already recognized the power of Congress to deny an employer the freedom to discriminate in discharging. * * * So far as questions of constitutionality are concerned, we need not enlarge on the statement of Judge Learned Hand in his opinion below that there is 'no greater limitation in the denying him (employer) the power to discriminate in hiring than in discharging.' The course of decisions in this Court since *Adair v. United States*, 208 U. S. 161, 52 L. Ed. 436, 28 S. Ct. 277, 13 Ann. Cas. 764 and *Coppage v. Kansas*, 236 U. S. 1, 59 L. Ed. 441, 35 S. Ct. 240, L. R. A. 1915 C. 960, have completely sapped those cases of their authority."

In the State of Nebraska similarly many laws were passed which regulated the relationship between the employer and the employee. I refer the court to Chapter

Forty-eight (48) of the Revised Statutes of Nebraska, 1943. In that act an industrial commission may be created to try labor controversies and such a commission has now been created. Hours and conditions of work for women and children are regulated. Hours of labor for motor transport companies have been regulated.

By the exigencies of time and by actual practice the relationship between employer and employee has become and has been recognized to be preeminently public in nature and therefore within the police power of the state.

In the case of *American Federation of Labor v. Watson*, 60 Fed. Supp. 1016 (reversed by the Supreme Court of the United States so that the State Court could pass upon the question of the constitutionality of the act), the court held:

"Labor and labor unions are affected by public interest and are subject to the regulatory power of the states for any reasonable regulation which is not inconsistent with the constitution of the United States and Statutes enacted within the scope designated by the Constitution to the Congress."

The appellants contend that the amendment is unconstitutional because it impairs the obligation of contracts.

In the case of *Long Island Water Supply Company v. Brooklyn*, 41 L. Ed. 1165, 175 S. Ct. 718, the court stated:

"But into all contracts whether made between states and individuals or between individuals only there enter conditions which arise, not out of the literal terms of the contracts itself; they are super-

induced by the pre-existing and higher authority of the law of nature, of nations or of the community to which the parties belong; they are always presumed, and must be presumed to be known and recognized by all, are binding upon all, and need never therefore, be stipulated."

In *Home Building & Loan Association v. Blaisdell*, 78 L. Ed. 255, 88 A. L. R. 1481, the Supreme Court of the United States held:

"The state also continues to possess authority to safeguard the vital interests of its people. It does not matter that such legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect.'

"* * * Not only are existing laws read into contracts in order to fix obligations between the parties but, the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against imperiment presupposes the maintenance of a government by virtue of which contractual relations are worthwhile * * * a government which retains adequate authority to secure the peace and good order of society. The principle of harmonizing the Constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this court."

In the case of *Indiana, ex rel. Anderson v. Brand*, 82 L. Ed. 444, 58 S. Ct. 443, 113 A. L. R. 1482, the court stated:

"Our decisions recognize that every contract is made subject to the implied conditions that its fulfillment may be frustrated by a proper exercise of the police power;"

Also, in the case of *Union Dry Goods Company v. Georgia Public Service Corporation*, 63 L. Ed. 309, 39 S. Ct. 117, the court held:

"That private contract rights must yield to the public welfare where the latter is appropriately declared and defined and, the two conflict, has been often decided by this court."

In the case of *Manigault v. Springs*, 50 L. Ed. 274, 26 S. Ct. 127, the court stated:

"Its the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from (properly) exercising such powers * * * for the general good of the public, though contracts previously entered into by individuals may thereby be affected."

In *Atlantic Coast Line v. Goldsboro*, 58 L. Ed. 721, 34 S. Ct. 364, the court declared:

"It is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that the power can neither be abdicated nor bargained away and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise."

In the more recent case of *East New York Savings Bank v. Hahn*, 90 L. Ed. 9, 66 S. Ct. 69, 160 A. L. R. 1279, the court summarized and set forth these principles in the following language:

"The formal mode of reasoning by means of which this 'protective power of the state' is acknowledged

is of little moment. It may be treated as an implied condition of every contract and, as such as much a part of the contract as though it were written into it, whereby the States' exercise of its power enforces, and does not impair, a contract. "A more candid statement is to recognize as was said in *Manigault v. Springs*, supra, that the power, 'which in its various ramifications is known as the police power, is an exercise of the sovereign right of the government to protect the * * * general welfare of the people and is paramount to any rights under contracts between individuals.' Once we are in this domain of the reserve power of a State we must respect the 'wide discretion on the part of the legislature in determining what is and what is not necessary.' So far as the constitutional issue is concerned, the power of the State when otherwise justified is not diminished because a private contract may be affected."

The Supreme Court of the United States, in *West Coast Hotel v. Parrish*, 81 L. Ed. 445, 57 S. Ct. 578, 108 A. L. R. 1330, stated this rule very cogently:

"This power under the constitution to restrict freedom of contract has had many illustrations. That it may be exercised in the public interest with respect to contracts between employer and employee is undeniable."

It seems clear therefore that in recent years our courts have almost unanimously held that where the public welfare is concerned, the state, under its police power, has the right to enact any law which will reasonably protect the public welfare, and it may in doing so affect existing contracts between individuals without violating the "contract" clause nor the "due process" clause of the Federal Constitution. The courts have gone so far as to

hold that this police power of the state is implied in every contract.

In the case of *Hudson County Water v. McCarter*, 52 L. Ed. 828, 28 S. Ct. 529, the court stated:

"One whose rights such as they are, are subject to state restrictions cannot remove them from the power of the state by making a contract about them."

It is evident that parties cannot deprive the state of its police power simply by making a contract between themselves. Since this power of the state to pass legislation which may affect existing contracts is implied in every contract drawn, then we must read the contract between the Lincoln Federal Labor Union and the Northwestern Iron and Metal Company as if it actually provided that this contract between the parties is subject to any legislation which the state may adopt under its police power. With such a clause implied in the contract the constitutional amendment in question not only does not abrogate the existing contract but is actually a part of it. The constitutional amendment being a part of the contract between the parties, cannot, therefore, violate any provision of the Federal Constitution, nor can it deprive the plaintiffs of any right guaranteed to them by the Federal Constitution.

The Constitutional Provision of the Nebraska Constitution Under Attack is for the Purpose of Regulating Employer and Employee Relationships, and is Not a Prohibition of Union Activities.

The appellants in their brief admit that employer and employee relationship is subject to regulation, but claim

that this constitutional amendment is not regulation, but prohibition, and that it goes farther than necessary to achieve the objective. I believe that the appellants have lost sight of the objective. Throughout their entire brief and in the economic brief that they have filed they extol the virtues of the union and argue vigorously that this amendment will destroy the union. This reasoning is wholly fallacious. The constitutional amendment does not deprive the union of its existence, does not prevent the union from organizing as such, does not prevent the union to bargain collectively, if it meets the requirements of the Taft-Hartley Act. The only objective of the amendment under attack is to prevent discrimination in the hiring and discharging of employees. As is set out in Section 1 of the amendment, the only objective was to eliminate in this state the practice of denying employment "because of membership in or affiliation with, or resignation or expulsion from a labor organization." This is the objective of the amendment. This is what it clearly states. It does not go further than the objective. It does not destroy or prohibit unions.

In 31 C. J. S., Section 16, page 530, we find the following:

"The evil which the legislature intended to correct in framing a constitutional amendment or a statute is judicially noticed where the knowledge thereof is derived from a consideration of various prior public history or common knowledge."

Many cases are there cited approving the above.

The above rule of law was followed by the Supreme Court of Nebraska in *Redell v. Moores, et al.*, 63 Neb, 219, 88 N. W. 243, wherein the court stated:

"In the construction of a statute courts will take judicial notice of events which are generally known and matters of common knowledge within the limits of their jurisdiction."

The above was quoted with approval in the case of *State v. Bachelor*, 139 Neb. 253, 297 N. W. 138.

Thus the court, taking judicial notice of the objective of the amendment, and what the people expected to accomplish by its adoption, must come to the conclusion that the amendment is not broader than the objective, but that the amendment is the objective. That the amendment does not prohibit the existence of unions.

The Constitutional Provision of the Nebraska Constitution Under Attack is Not Arbitrary Nor is it Capricious, but is a Reasonable Exercise of the Police Power of the State.

We admit that a state cannot, under the guise of its police power, pass arbitrary or unreasonable legislation. Is this amendment under attack so unreasonable and so arbitrary that it must be declared violative of the Federal Constitution?

The right to work and earn a livelihood is almost an inalienable right, at least it is so in this country. A person's qualifications and a right to earn a livelihood should not depend upon his race, his creed, his color, or his joining any private organization, nor should he be deprived of his right to work if he does join a private organization, such as a union.

Prior to 1935, when some employers discharged employees for their activities in a union and this practice

became so widespread that it was affecting the welfare of the nation, the National Labor Relations Act was passed which contained the provision that the discharge of an employee by reason of his union activity was an unfair labor practice. This provision was retained in the Taft-Hartley Act. By the provisions in the National Labor Relations Act the legal right of the employer to discharge an employee for his union activities, which right the employer previously had was taken away from him. Since that time the pendulum has swung the other way and many employees were either denied employment or were discharged because they did not belong to a union and the discharge of such employees has become a major public concern. That this practice has become of great public concern is evident by the fourteen states that have adopted similar legislation either by constitutional amendments or by legislative enactment. No one can deny that the question of the right to work with or without joining a union is of supreme public importance and has a great effect upon the economy and welfare of the state and nation. This amendment adopted by the people of the State of Nebraska attempts to prevent discrimination against employees who do not belong to such private organizations. To remedy that situation the State of Nebraska adopted the constitutional amendment making that practice in this state unlawful.

When is a law or constitutional amendment so unreasonable that it must be declared unconstitutional? The Supreme Court of the United States, in the case of *Gundling v. Chicago*, 177 U. S. 183, 44 L. Ed. 725, 20 S. Ct. 633, in dealing with court interference with the operation of a regulative statute, stated:

"Unless the regulations are so utterly unreasonable and extravagant in their matter and purpose that the property and personal rights of the citizens are unnecessary, and in a manner wholly arbitrary, interfered with, or destroyed without 'due process' of law' they do not extend beyond the power of the state to pass, and they form no subject for federal interference."

No organization, public or private, should have the right to say who shall work and who shall not work. The constitutional amendment carries into effect a man's inalienable right to work without let or hindrance, subject only to such regulations which are necessary for the preservation of the state and subject only to the health and welfare of the state.

In the case of *Home Building & Loan Association v. Blaisdell*, 78 L. Ed. 255, 88 A. L. R. 1481, Chief Justice Hughes stated:

"It is manifest from this review of our decisions that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contradiction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very basis of individual opportunity. Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected; and that the question is no longer merely

that of one party to a contract as against another but of the use of reasonable means to safeguard the economic structure upon which the good of all depends.

"It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning - - 'We must never forget that it is a *Constitution* we are expounding' (M'579, 601) - - 'a constitution intended to endure for ages to come, and, consequently to be adapted to the various crises of human affairs.' *Id.*, p. 415. When we are dealing with the words of the constitution, said this Court in *Missouri v. Holland*, 252 U. S. 416, 433, 64 L. Ed. 641, 647, 40 S. Ct. 382, 11 A. L. R. 984, 'we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. * * * The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.'

"Nor is it helpful to attempt to draw a fine distinction between the intended meaning of the words of the Constitution and their intended application. When we consider the contract clause and the decisions which have expounded it in harmony with the essential reserved power of the States to protect the security of their peoples, we find no warrant for

the conclusion that the clause has been warped by these decisions from its proper significance or that the founders of our Government would have interpreted the clause differently had they had occasion to assume that responsibility in the conditions of the later day. The vast body of law which has been developed was unknown to the fathers but it is believed to have preserved the essential content and the spirit of the Constitution. With a growing recognition of public security, the court has sought to prevent the perversion of the clause through its use as an instrument to throttle the capacity of the States to protect their fundamental interests. This development is a growth from the seeds which the fathers planted. It is a development forecast by the prophetic words of Justice Johnson in *Ogden v. Saunders*, already quoted. And the germs of the later decisions are found in the early cases of the *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. Ed. 773, and the *West River Bridge Co. v. Dix*, 6 How. 507, 12 L. Ed. 535, *Supra*, which upheld the public right against strong insistence upon the contract clause. The principle of this development is, as we have seen, that the reservation of the reasonable exercise of the protective power of the State is read into all contracts."

This court cannot, and I am sure will not, concern itself with the political and economic wisdom of the constitutional amendment under attack. The people of the State of Nebraska, after considerable debate, decided that this amendment was necessary for the best interest of the state. The people of this state voted in favor of this amendment and adopted it. They have a right to experiment and attempt to find solutions for such problems that vex them.

If in the future the act does not solve the problem, again the people may, by vote, repeal the constitutional amendment. This power is within the people. Taking full cognizance of the present economic conditions, of the great need for a law to prevent discrimination in the field of employee and employer relationship, keeping in mind that this relationship between employer and employee is of great interest to the state, which represents all of the people, employer-employee relationship is a subject for state regulation. Therefore, it comes within the police power of the state, and being within the police power does not contravene any part of the Constitution of the United States.

I have read the one hundred and eighteen (118) pages of the brief filed by the appellants and the economic brief filed in support thereof. I think that the forepart of this brief fully answers practically all of the issues and objections to the amendment raised by the appellants.

It seems that the theme of the entire appellants' brief is that the constitutional amendment has taken away from the union one of its potent weapons which the union uses to obtain its objective, and that this weakens the power of the union. The appellants, it seems to me, have overlooked one prime factor, and that is, that in the economic struggle between the employer and the employee, as organized groups, or as individuals, there is a third party who has a stake in that struggle. The third party is the state, which represents the people. It seems to me that the issue is not the effect of the amendment on the union, but rather the need of the amendment to protect the welfare of the people of the state. That is completely overlooked in the appellants' brief. In the forepart of my brief, I think I have fully demonstrated that point.

The appellants spend another considerable portion of their brief on the theory that although they admit that regulation of the union is within the province of the state, they claim that this amendment is not regulation but prohibition. Again I say they overlook, or rather place too narrow a construction on the amendment. It is the purpose of the state to regulate one part of the employer and employee relationship, and in that regulation, unions as well as employers are prohibited from refusing employment on the grounds of belonging or not belonging to a union; and employers are further prohibited from discharging members if they cease to be members of a union.

It seems to me that this is only a regulation. It does not prohibit unions, it does not prohibit collective bargaining, it does not prohibit meetings, free speech or assembly. All regulation takes away some rights that those who are being regulated had prior to such regulation. Before the advent of the automobile people had the right to travel on the highway at any speed they chose. After the automobile became the common mode of travel, speed laws were enacted which deprived the people of that right. They can no longer travel at any speed they desire, but have to limit themselves to the speed designated by the municipality or state. The automobile also made it necessary to enact parking laws. It prohibited people from parking vehicles in certain localities.

The zoning laws prohibited people from using their property as they saw fit, but they had to comply with the zoning requirements which prohibited certain businesses or certain use of the property in certain localities. This is not a prohibition, but a regulation.

Prior to the Fair Labor Standards Act, the employer was at liberty to set the wages and hours of employment. That act prohibited the employer from so doing. That is not a prohibition, but a regulation.

I could multiply these examples, but I think the above are sufficient to show that what the appellants claim is prohibition, is not prohibition but merely regulation in which certain acts are prohibited.

The appellants cite many cases which hold that the so-called union shop or union security agreements, had been held valid. Certainly that question is not an issue in this case. Nobody denies the validity of such contracts, if they are not prohibited by statute or constitution. However, a state has the right, within its police power, and within its right to regulate the relationship of employer and employee, to make such provisions of a contract unenforceable. This right of the state was fully recognized by the Congress of the United States in the passing of the Labor Management Relations Act of 1947, commonly known as the Taft-Hartley Law, wherein it provided in Section 101 (14) (b):

"Nothing in this act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which execution or application is prohibited, by State or Territorial Law."

It seems to me that the cases cited and the arguments made as to the legality of the so-called union shop or union security agreements does not support the issue before the court, and is wholly irrelevant.

It will greatly prolong this brief should I attempt to analyze each one of the cases cited by the appellants in support of their argument. Many of the cases, as I already have pointed out, are not in point and the holdings in those cases are irrelevant to the issues involved. The other cases, I believe, tend to support the contention of the appellees that the constitutional amendment adopted by the people of the State of Nebraska, is in all respects valid, and does not in any way violate any part of the Constitution of the United States. I believe the Supreme Court of the United States, in the case of *Nebbia v. New York*, 291 U. S. 502, 78 L. Ed. 563, 89 A. L. R. 1469, 1474, forcefully answers most of the arguments made by the appellants in the following words:

"Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. *But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest.* As Chief Justice Marshall said, speaking specifically of inspection laws, such laws form 'a portion of that immense mass of legislation, which embraces everything within the territory of a state, * * * all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal Commerce of a state * * * are component parts of this mass.' Justice Barbour said for this court: '* * * It is not only the right, but the bounden and solemn duty of a state, to advance the

safety, happiness, and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps more properly be called "Internal Police," are not thus surrendered or restrained; and that consequently, in relation to these, the authority of a state is complete, unqualified, and exclusive.' And Chief Justice Taney said upon the same subject: *'But what are the police powers of a state? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions.* And whether a state passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, except insofar as it has been restricted by the Constitution of the United States.' Thus has this court from the early days affirmed that the power to promote the general welfare is inherent in government. Touching the matters committed to it by the Constitution the United States possesses the power, as do the states in their sovereign capacity touching all subjects jurisdiction of which is not surrendered to the Federal Government, as shown by the quotations above given. These correlative rights, that of the citizen to exercise exclusive dominion over property and freely to contract about his affairs, and that of the state to regulate the use of property and the con-

duct of business, are always in collision. No exercise of the private right can be imagined, which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of the citizen which will not to some extent abridge his liberty or affect his property. But subject only to constitutional restraint the private right must yield to the public need.

"The Fifth Amendment, in the field of Federal activity, and the fourteenth as respects State action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as had often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." (Emphasis supplied.)

The basic question in this litigation is not new. It has been a subject for discussion and litigation since the adoption of the Federal Constitution. That question is how to maintain the rights of the states and the rights of our Federal Government, each in its particular sphere, without clashing with each other. Where each sphere begins and ends has been many times decided by this court in particular cases before it. No permanent yardstick can ever be made in a viril society, but the decision must be made in the time and on the facts at hand.

Justice Frankfurter, in his dissenting opinion in the case of *West Virginia State Board of Education v. Barnett*, 319 U. S. 624, sets out this problem very succinctly in the following words:

"The whole Court is conscious that this case reaches ultimate questions of judicial power and its relation to our scheme of government. It is appropriate, therefore, to recall an utterance as wise as any that I know in analyzing what is really involved when the theory of this Court's function is put to the test of practice. The analysis is that of James Bradley Thayer:

"* * * There has developed a vast and growing increase of judicial interference with legislation. This is a very different state of things from what our fathers contemplated a century and more ago, in framing the new system, would this great, novel, tremendous power of the courts be exerted, * * * would this sacred ark of the covenant be taken from within the veil. Marshall himself expressed truly one aspect of the matter, when he said in one of the later years of his life: 'No questions can be brought before a judicial tribunal of greater delicacy than those which involve the constitutionality of legislative acts. If they become indispensably necessary to the case, the court must meet and decide them; but if the case may be determined on other grounds, a just respect for the legislature requires that the obligation of its laws should not be unnecessarily and wantonly assailed.' And again, a little earlier than this, he laid down the one true rule of duty for the courts. When he went to Philadelphia at the end of September, in 1831, on that painful errand of which I have spoken in answering a cordial tribute from the bar of that city he remarked that if he might be permitted to claim for himself and his associates any part of the kind things they had said, it would be this, that they had 'never sought to enlarge the judicial power beyond its proper bounds, nor feared to carry it to the fullest extent that duty required.'

“That is the safe two fold rule; nor is the first part of it any whit less important than the second; nay, more; today it is the part which most requires to be emphasized. For just here comes in a consideration of the very great weight. Great and, indeed, inestimable as are the advantages in a popular government of this conservative influence, * * * the power of the judiciary to disregard unconstitutional legislation,—it should be remembered that the exercise of it, even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way and correcting their own errors. If the decision in *Munn v. Illinois* and the ‘Granger Cases,’ twenty-five years ago; and in the ‘Legal Tender Cases,’ nearly thirty years ago, had been different; and the legislation there in question, thought by many to be unconstitutional and by many more to be ill-advised, had been set aside, we should have been saved more trouble and some harm. But I venture to think that the good which came to the country and its people from the vigorous thinking that had to be done in the political debates that followed, from the infiltration through every part of the population of sound ideas, elements, the enlargement of ideas, the strengthening of moral fibre, and the growth of political experience that came out of it all,—that all this far more than outweighed any evil which ever flowed from the refusal of the court to interfere with the work of the legislature.

“The tendency of a common and easy resort to this great function now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility. It is no light thing to do that.

"What can be done? It is the courts that can do most to cure the evil; and the opportunity is a very great one. Let them resolutely adhere to first principles. Let them consider how narrow is the function which the constitutions have conferred on them—the office merely of deciding litigated cases; how large, therefore, is the duty intrusted to others, and above all to the legislature. It is that body which is charged, primarily, with the duty of judging of the constitutionality of its work. The constitutions generally give them no authority to call upon a court for advice; they must decide for themselves, and the courts may never be able to say a word. Such a body, charged in every State, with almost all the legislative power of the people, is entitled to the most entire and real respect; is entitled, as among all rationally permissible opinions as to what the constitution allows, to its own choice. Courts, as has often been said, are not to think of the legislators, but of the legislature—the great, continuous body itself, abstracted from all the transitory individuals who may happen to hold its power. It is this majestic representative of the people whose action is in question, a coordinate department of the government, charged with the greatest functions, and invested, in contemplation of law, with whatsoever wisdom, virtue, and knowledge the exercise of such functions requires.

"To set aside the acts of such a body, representing in its own field, which is the very highest of all, the ultimate sovereign, should be a solemn, unusual and painful act. Something is wrong when it can ever be other than that. And if it be true that the holders of legislative power are careless of evil, yet the constitutional duty of the court remains untouched; it cannot rightly attempt to protect the people, by undertaking a function not its own. On the other hand, by adhering rigidly to its own duty, the court will

help, as nothing else can, to fix the spot where responsibility lies, and to bring down on that precise locality the thunderbolt of popular condemnation. The judiciary, today, in dealing with the acts of their coordinate legislators, owe to the country no greater or clearer duty than that of keeping their hands off these acts wherever it is possible to do it. For that course—the true course of judicial duty always—will powerfully help to bring the people and their representatives to a sense of their own responsibility. There will still remain to the judiciary an ample field for the determination of this remarkable jurisdiction, of which our American law has so much reason to be proud; a jurisdiction which has had some of its chief illustrations and its greatest triumphs, as in Marshall's time, so in ours while the courts were refusing to exercise it." (J. B. Thayer, John Marshall, (1901) 104-10)' " (Emphasis supplied.)

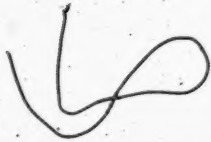
CONCLUSION.

We believe that in the forepart of this brief we have fully demonstrated that Sections 13, 14 and 15, Article XV of the Constitution of the State of Nebraska, does not violate any of the rights granted to the appellants under the First and Fourteenth Amendments to the Constitution of the United States. That it does not deny to the appellants the right of free speech and free press, the right to organize, or the right to collective bargaining. That the above sections of the Constitution of the State of Nebraska are not contrary to any part of the Constitution of the United States. That the above sections of the Constitution of the State of Nebraska are in all respects valid and binding.

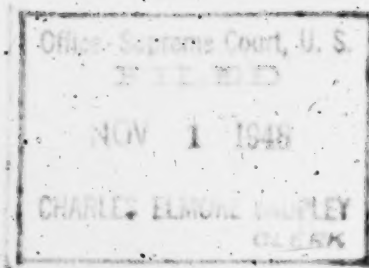
We respectfully urge that this court declare that Sections 13, 14, and 15 of the Constitution of the State of Nebraska are valid and constitutional, and that the judgment of the Supreme Court of the State of Nebraska be affirmed.

Respectfully submitted,

LOUIS B. FINKELSTEIN,
*Counsel for Northwestern Iron &
Metal Co. and Dan Giebelhouse.*



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SUPREME COURT, U. S.**



**IN THE
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1948

No. 34

**GEORGE WHITAKER, A. M. DeBRUHL, T. G.
EMBLER, ET AL, Appellants**

vs.

STATE OF NORTH CAROLINA

**BRIEF OF APPELLEE,
STATE OF NORTH CAROLINA
ON APPEAL FROM THE SUPREME COURT OF
NORTH CAROLINA**

**HARRY McMULLAN,
Attorney General of
North Carolina**

**RALPH MOODY,
Assistant Attorney General**

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**IN THE
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1948

No. 34

**GEORGE WHITAKER, A. M. DeBRUHL, T. G.
EMBLER, ET AL,** **Appellants**

vs.

STATE OF NORTH CAROLINA

**BRIEF OF APPELLEE,
STATE OF NORTH CAROLINA
ON APPEAL FROM THE SUPREME COURT OF
NORTH CAROLINA**

OPINION BELOW

The opinion of the Supreme Court of North Carolina in this case is printed in full beginning on page 57 of the Record in No. 34. It is also reported as follows: STATE v. WHITAKER, ET AL, 228 N. C., 352; 45 S. E. (2d) 860.

JURISDICTION OF THE COURT

The appellants, acting under Section 237(a) of the Judicial Code as amended (28 U.S.C.A. 344(a)), have invoked the jurisdiction of this Court. The validity of a

statute of North Carolina is involved upon the contention that it violates the Constitution of the United States. The Supreme Court of North Carolina sustained the validity of the statute. Appellee filed statement opposing jurisdiction and motion to dismiss or affirm (Filed under No. 660, October Term, 1947). On March 29, 1948, this Court entered an order noting probable jurisdiction. (R. 88; No. 34).

STATUTE IN QUESTION

The appellants were convicted in a criminal action in which they were charged with a violation of Sections 2, 3 and 5 of Chapter 328 of the Session Laws of 1947 (Article 10 of Chapter 95 of the General Statutes of North Carolina). The statute, including its caption, is here quoted in full:

"An Act to protect the right to work and to declare the public policy of North Carolina with respect to membership or non-membership in labor organizations as affecting the right to work; to make unlawful and to prohibit contracts or combinations which require membership in labor unions, organizations or associations as a condition of employment; to provide that membership in or payment of money to any labor organization or association shall not be necessary for employment or for continuation of employment and to authorize suits for damages.

"The General Assembly of North Carolina do enact:

"Section 1. The right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraints and coercion. It is hereby declared to be the public policy of North Carolina that the right of persons to work shall not be denied or abridged on account of member-

ship or non-membership in any labor union or labor organization or association.

"Sec. 2. Any agreement or combination between any employer and any labor union or labor organization whereby persons not members of such union or organization shall be denied the right to work for said employer or whereby such membership is made a condition of employment or continuation of employment by such employer, or whereby any such union or organization acquires an employment monopoly in any enterprise, is hereby declared to be against the public policy and an illegal combination or conspiracy in restraint of trade or commerce in the State of North Carolina.

"Sec. 3. No person shall be required by an employer to become or remain a member of any labor union or labor organization as a condition of employment or continuation of employment by such employer.

"Sec. 4. No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment.

"Sec. 5. No employer shall require any person, as a condition of employment or continuation of employment to pay any dues, fees, or other charges of any kind to any labor union or labor organization.

"Sec. 6. Any person who may be denied employment or be deprived of continuation of his employment in violation of Sections 3, 4 and 5, or of one or more of such Sections, shall be entitled to recover from such employer and from any other person, firm, corporation, or association acting in concert with him by appropriate action in the courts of this State such

damages as he may have sustained by reason of such denial or deprivation of employment.

"Sec. 7. The provisions of this Act shall not apply to any lawful contract in force on the effective date hereof but they shall apply in all respects to contracts entered into thereafter and to any renewal or extension of any existing contract.

"Sec. 8. If any clause, sentence, paragraph or part of this Act or the application thereof to any person or circumstance, shall, for any reason, be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this Act, and the application thereof to other person or circumstances, but shall be confined to the part thereof directly involved in the controversy in which such judgment shall have been rendered and to the person or circumstance involved.

"Sec. 9. All laws and clauses of laws in conflict with this Act are hereby repealed.

"Sec. 10. This Act shall be in full force and effect from and after its ratification."

ARRANGEMENT OF BRIEF

Appellee's argument will be formulated around and based upon the following points:

I. The right-to-work statute is neither an invasion of the right to form and maintain a trade union, nor an invasion of the freedoms of speech and assembly as guaranteed by the First and Fourteenth Amendments.

A. The clear and present danger test is not applicable.

B. The right-to-work statute need only meet the test of reasonableness.

II. Employment contracts are subject to the police power.

A. The right-to-work statute is a valid exercise of the police power.

III. The right-to-work statute has a real and reasonable relation to the public welfare.

A. It prevents a monopolization of the labor market.

B. It prevents trade union abuses directly and indirectly caused by the closed shop.

IV. The statute does not violate the equal protection clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

Appellants, other than Whitaker, are officers and agents of unions affiliated with the American Federation of Labor and Asheville Building and Construction Trades Council. Appellant, Whitaker, is and has been a building contractor for many years. After the passage of the above-quoted statute, appellant, Whitaker, entered into a contract with the unions composing the Trades Council containing a closed shop clause, and giving the unions the right to fix all wages as well as hours and conditions of work. Appellants, other than Whitaker, signed the contract as officers and agents of various unions. (See Contract No. 34; R. 10).

Appellants were convicted in the Police Court of the City of Asheville and appealed to the Superior Court of Buncombe County. Appellants were tried in the Superior Court before a jury and upon the charges contained in the warrant. (No. 34; R. 2). In apt time, appellants filed motions to quash and in arrest of judgment, (No. 34; R. 4, 6), for the purpose of attacking the constitutionality of the above statute, and procedurally, such questions are pro-

perly raised according to North Carolina practice. Appellants were convicted by the jury and each fined \$50.00 and his pro rata part of the costs (No. 34; R. 7) and appealed to the Supreme Court of North Carolina.

It was not denied that the closed shop agreement had been executed by appellants; and so far as evidence is concerned, appellants have violated the above statute if it is valid. Appellant, Whitaker, the President of the North Carolina Federation of Labor, and other officers of unions, testified in behalf of appellants, and without objection, gave opinions and conclusions as to the values to be derived from closed shop agreements. (No. 34; R. 12, 14, 16, 21).

The Supreme Court of North Carolina affirmed the judgment of the Superior Court (No. 34; R. 57; 228 N. C. 352; 45 S. E. (2d) 860) and decided all federal questions adversely to appellants' contentions.

ARGUMENT

I

THE STATUTE DOES NOT VIOLATE THE FIRST AMENDMENT AS ITS PRINCIPLES ARE INCORPORATED IN THE FOURTEENTH AMENDMENT, NOR DOES IT INVADE ANY RIGHT TO ORGANIZE AND MAINTAIN A TRADE UNION.

Appellants contend that the North Carolina statute (Chapter 328; Session Laws of 1947) restrains and impairs the exercise of the civil rights of assembly and speech as guaranteed and safeguarded under the First Amendment, and also safeguarded against state action by the due process of law clause of the Fourteenth Amendment (*WEST VIRGINIA v. BARNETTE*, 319 U. S. 624, 63 S. Ct. 1178).

It is said in substance: The liberties protected by the Fourteenth Amendment, including therein the First Amendment, not only include the rights of workmen to assemble at union meetings and peacefully disseminate ideas by speech and press but also the economic activities of workmen carried on through a union. It is said that these guarantees "extend to the activities of workmen in forming and protecting their labor organizations," and, therefore, as a consequence, a union and its agents cannot be prohibited from the activity of entering into a closed shop contract with an employer. As a result, therefore, of the application of the doctrine of union security, contract rights which are "not fundamental in nature," and are a "lesser species of right," are transmuted and transformed into rights equivalent to freedom of assembly and speech and are thereby to be accorded the favored position of fundamental personal rights. Thus, an economic right or activity is changed into a personal right.

This position of appellants carried to its logical conclusion would mean that any acts or activities of a labor union could claim the First Amendment, as applied in the Fourteenth Amendment, as a shield for anything done in the furtherance of union security or to further the bargaining power of the union as a means of obtaining an increased share of the fruits of economic endeavor. It could just as well justify the assassination of a business manager or employer active in the field of organizing business interests against union labor. In a certain sense and by a chain of causation, all human conduct and activities are the consequence of and are traceable to conferences, assemblies, exchange of speech and dissemination of ideas. It is only where the fundamental rights of assembly and speech are

so interconnected and compounded with economic activity that, in the protection of the fundamental liberties, the furtherance of certain economic activities incidental to these liberties is likewise protected. Appellants quote from *THOMAS v. COLLINS*, 323 U. S. 516, 531, 65 S. Ct. 315, as follows: "The idea is not sound, therefore, that the First Amendment's safeguards are wholly inapplicable to business and economic activity." This Court, however, was careful to explain what was meant by this quotation was that the assembling and discussions of working men as to the advantages and disadvantages of unions was protected as a part of assembly and free speech, irrespective of the fact that the discussions were based on the advantages of unions and the benefits that unions secured for their members. In this connection, the Court said:

"That the State has power to regulate labor unions with a view to protecting the public interest is, as the Texas court said, hardly to be doubted. They cannot claim special immunity from regulation. Such regulation however, whether aimed at fraud or other abuses, must not trespass upon the domains set apart for free speech and free assembly. This Court has recognized that 'in the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution . . . Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.' *Thornhill v. Alabama*, 310 US 88, 102, 103, 84 L ed 1093, 1102, 1103, 60 S Ct 736; *Senn v. Tile Layers Protective Union*, 301 US 468, 478, 81 L ed 1229, 1236, 57 S Ct 857. The right thus to discuss, and inform people concerning, the advantages

and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly. *Hague v. Committee for Industrial Organization*, 307 US 496, 83 L ed 1423, 59 S Ct 954. The Texas court, in its disposition of the cause, did not give sufficient weight to this consideration, more particularly by its failure to take account of the blanket effect of the prohibition's present application upon public discussion and also of the bearing of the clear and present danger test in these circumstances."

The same argument that the appellants here make as to the breadth of application of the First Amendment was made on the employer side in the case of *ASSOCIATED PRESS v. UNITED STATES*, 326 U. S. 1, 65 S. Ct. 1416, where the Associated Press, upon an indictment for a violation of the Sherman Anti-Trust Act, contended that the relationship of its members was protected by freedom of speech and freedom of the press. In disposing of this argument, this Court said:

"The fact that the publisher handles news while others handle food does not, as we shall later point out, afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his business practices.

"Nor is a publisher who engages in business practices made unlawful by the Sherman Act entitled to a partial immunity by reason of the 'clear and present danger' doctrine which courts have used to protect freedom to speak, to print, and to worship. That doctrine, as related to this case, provides protection for utterances themselves, so that the printed or spoken word may not be the subject of previous restraint or punishment, unless their expression creates a clear and present danger of bringing about a substantial

evil which the government has power to prohibit. *Bridges v. California*, 314 US 252, 261, 86 L ed 192, 202, 62 S Ct 190. Formulated as it was to protect liberty of thought and of expression, it would degrade the clear and present danger doctrine to fashion from it a shield for business publishers who engage in business practices condemned by the Sherman Act. Consequently, we hold that publishers, like all others charged with violating the Sherman Act, are subject to the provisions of the summary judgment statute."

This part of appellants' argument is evidently derived from an article written by Mr. Joseph P. Witherspoon, Jr., published in Volume 26 of the *Texas Law Review*, beginning on page 47. The writer in this article discusses the possible approaches that this Court might take in considering the so-called anti closed shop legislation of the states. He suggests that if the restriction or deprivation complained of as to the closed shop statutes could be considered as restricting or depriving workmen and labor unions of a personal right as opposed to an economic right, then persons attacking such a statute would have the benefit of the "clear and present danger test," and there would, therefore, be no presumption of constitutionality; and the proponents of the measure or statute would be compelled to assume a burden of showing a clear and present danger in order to justify state action. Apparently, Mr. Witherspoon, himself, does not have too much confidence in this contention for he says, on page 59 of the article: "It would be difficult, however, for the Court to classify the contract-making privilege of workers as 'personal,' for contract rights have been treated by the Court as 'economic' in nature. If, however, such right is really 'economic', then an unchanged right-classification device would require the

application of the 'test of reasonableness' with its pitfalls for the challenger under the burden of proof."

In support of their contention, appellants cite four decisions of the United States Supreme Court. Those decisions are: *HAGUE v. C. I. O.*, 307 U. S. 496; *THORNHILL v. ALABAMA*, 310 U. S. 88, 60 S. Ct. 736; *W. VA. v. BARNETT*, 319 U. S. 624, 63 S. Ct. 1178 and *THOMAS v. COLLINS*, 323 U. S. 516, 65 S. Ct. 315. The general tenor of these holdings is to establish the principle that the right to assemble and function through labor organizations is a concomitant of the civil rights of assembly and speech as guaranteed by the above-mentioned constitutional provisions. However, neither the facts nor principles of those cases are applicable to the case at bar.

In the *HAGUE* case, *supra*, the C. I. O. union complained that a Jersey City ordinance (which forbade the leasing of any hall without a permit from the Chief of Police for a public meeting at which the speaker would advocate the obstruction, overthrow, or change of government by other than lawful means) was being used to prevent the union from discussing rights afforded to workers by the National Labor Relations Act. And that another ordinance (forbidding the public distribution of printed matter) prevented the union from informing workers of their rights by circulars. The Court held that such use of these ordinances infringed the privileges and immunities of citizens concerned as "the right peaceably to assemble and to discuss these topics and to communicate respecting them, whether orally or in writing, is a privilege inherent in citizenship of the United States which the (Fourteenth) Amendment protects."

The *THORNHILL* case, *supra*, was concerned with the

use of an Alabama anti-picketing statute when used to prohibit peaceful picketing. The Court held that "The danger of breach of the peace or serious invasion of rights of property or privacy at the scene of a labor dispute is not sufficiently imminent in all cases to warrant the legislature * * * (passing such a law)", and that "The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly * * * all matters of public concern without previous restraint or fear of subsequent punishment."

The BARNETTE case, *supra*, dealt with a resolution adopted by the West Virginia Board of Education requiring that a salute to the flag be a regular part of the activities of their public schools and that refusal to comply therewith be grounds for suspension. Certain children subscribing to the faith of Jehovah's Witnesses refused to salute as being against the dictates of their faith in that the salute represented to them placing an image of man above the laws of God. The Court held that expulsion from school for such refusal invaded the sphere of the intellect and spirit which it is the purpose of the First and Fourteenth Amendments of the Constitution to reserve from all official control.

THOMAS v. COLLINS, *supra*, dealt with a Texas statute which required an out-of-state union speaker to secure an organizer's card from state officials before being allowed to speak and solicit union memberships. The Court reaffirmed the power of the state to regulate labor unions with a view to protecting public interest but held that freedom of speech and assembly cannot be restricted unless required to save the public from a clear and present danger.

Clearly, none of these cases have any applicability to the present controversy. As pointed out in the opinion of the

Supreme Court of North Carolina, the statute does not, in any manner, impair, prevent or restrict the right of either side, or any faction of either side, to a labor controversy to assemble, to speak, and to publicize its own ideas. As was further pointed out, the North Carolina statute protects the rights of employees to organize, and protects their individual opinions by allowing them to refuse to join a union. In the words of Associate Justice Seawell, speaking for the Court:

"On the contrary, it seems to us that Chapter 328 may serve to secure the rights of free speech and assembly to all persons concerned. The statute protects the rights of workmen to organize; it further protects rights of workmen to express their individual opinions by refusing to join unions. The right of either side, or any faction of any side, to a labor controversy to assemble and publicize its own ideas remains inviolate." STATE v. WHITAKER, 228 N. C. 352, 368.

The Nebraska Court, in a well reasoned opinion sustaining the validity of the Nebraska right-to-work law, said:

"We cannot by any construction conclude that it violates the First Amendment by abridging freedom of speech, or the press, or the right of assembly, or the right of petition to the government for redress. As a matter of fact, it preserves to all employees the right to organize and join a union and the right to bargain collectively without fear of reprisal. Instead of preventing or abridging rights of speech, press, assembly, or petition, guaranteed by the First Amendment, the amendment preserves it for all employees, not only to those who join but also to those who do not join a union. Therefore, the amendment does not abridge the privileges or immunities of any citizen of the

United States in violation of the Fourteenth Amendment, but affirmatively protects those rights." LINCOLN FEDERAL LABOR UNION v. NORTH-WESTERN IRON AND METAL CO., 149 Neb. 507, 520.

The Arizona Court likewise, in sustaining that State's right-to-work law, said:

"Nothing in the amendment here under consideration either prevents, restricts, or even attempts to regulate the freedom of men to speak, assemble, or think. The amendment goes solely to prohibiting certain types of employment contracts or policies which the voters of Arizona believe work an injustice to non-members of labor organizations and so mitigate against the public welfare." A. F. of L. v. AMERICAN SASH AND DOOR CO., Arizona,

The Three-Judge Federal Court, in holding valid the Florida right-to-work statute, made this statement:

"The wording of the Florida Constitutional amendment is difficult, but it definitely does not violate the First Amendment by abridging freedom of speech or of the press or of the right of assembly, or the right of petition to the Government for redress. The assaulted amendment undertakes to preserve to employees, in full vigor, the right of collective bargaining. Instead of preventing or abridging the rights of speech, press, assembly, and petition, the amendment seeks to preserve it to those who do not join a labor union as well as to those who do. This amendment has no similarity to anti-picketing statutes or statutes which require the payment of a license by a labor organizer. The amendment is not in violation of the First Amendment to the Federal Constitution. The same is true of the allegations as to its violation of the Fourteenth

Amendment. There is no prohibition against a citizen belonging to any union that he chooses, but the prohibition seems to be against requiring membership in the union in order for a citizen to be eligible for work. Under statutes of the United States, such as Section 102, Title 29, U.S.C.A., a citizen is declared to be free to join a union or not, and one of the purposes of that statute, as well as the National Labor Relations Act, was to accord to employees full freedom to belong, or not to belong, to a union. The Florida constitutional amendment prohibits no one from joining a union but undertakes to declare that it shall not be a condition precedent to the right to work. It does not deny the labor union member the equal protection of the law, but appears to be designed to give to the non-union worker a protection of law which he had not theretofore enjoyed." *AMERICAN FEDERATION OF LABOR v. WATSON*, 60 Fed. Supp. 1010, reversed on other grounds in 327 U. S. 582.

The cases involving the dissemination of ideas or information about the merits of labor disputes while engaged in picketing do not support appellants' contentions.

We cite some of the more important cases as follows:

Thornhill v. Alabama, 310 U. S. 88, 60 S. Ct. 736

A. F. of L. v. Swing, 312 U. S. 321, 61 S. Ct. 568.

Carpenters Union v. Ritter's Cafe, 315 U. S. 722, 62 S. Ct. 807

Carlson v. California, 310 U. S. 106, 60 S. Ct. 746

It is apparent from a reading of these cases that the picketing was but an incident or background of the circumstances in which the dissemination of ideas on freedom of speech was taking place. The labor dispute was but the occasion of the exercise of freedom of expression. This is

pointed out by the Court in *CARPENTERS UNION v. RITTER'S CAFE*, *supra*, where the Court said:

"The constitutional right to communicate peaceably to the public the facts of a legitimate dispute is not lost merely because a labor dispute is involved. *THORNHILL v. ALABAMA*, 310 U. S. 88, or because the communication takes the form of picketing, even when the communication does not concern a dispute between an employer and those directly employed by him. *AMERICAN FEDERATION OF LABOR v. SWING*, 312 U. S. 321."

Likewise, in the case of *A. F. of L. v. SWING*, *supra*, this Court said:

"A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace. *AMERICAN STEEL FOUNDRIES v. TRI-CITY COUNCIL*, 257 U. S. 184, 209. The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer even though they are not in his employ. Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in *THORNHILL'S* case. 'Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution.' *SENN v. TILE LAYERS UNION*, 301 U. S. 468, 478."

In *THORNHILL v. ALABAMA*, *supra*, on this same point, this Court said:

"The range of activities proscribed by § 3448, whether characterized as picketing or loitering or otherwise, embraces nearly every practicable, effective means whereby those interested — including the employees directly affected — may enlighten the public on the nature and causes of a labor dispute. The safeguarding of these means is essential to the securing of an informed and educated public opinion with respect to a matter which is of public concern. It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion."

It will be seen, therefore, that the protection of ideas afforded by the First Amendment, as applied in principle in the Fourteenth Amendment, was a dominant concern of the Court and not the particular economic activity, union activity or setting in which the dissemination of ideas occurred. It was not the protection of picketing *per se* that was the subject of constitutional protection, but it was

because picketing was a vehicle or technique necessary to the workers for the effective dissemination of information to the public or to other workers that brought about the application of the Amendment just as it would be of no avail to have the abstract right of freedom of the press and then make it unlawful for an individual to own and operate a printing press. There is, therefore, no rational connection between freedom of speech and assembly or the right to enter into a contract for a closed shop. The chain of connection and causation is too remote, and the contract right itself is of a different classification and protected on a different constitutional theory. Appellants, therefore, cannot clothe themselves in raiments of free speech and assembly for the purpose of seeking the shield of the First Amendment when it has no application to the right in question.

• THE CLOSED SHOP IS NOT "INDISPENSABLE" TO ORGANIZATION AND SUCCESSFUL OPERATION OF LABOR UNIONS. THE NORTH CAROLINA STATUTE PROTECTS VOLUNTARY UNIONISM.

In their brief, appellants discuss the rise and development of the labor movement in the United States and the early practices resembling the closed shop, and this continuity of practice is urged upon the Court by way of sanction or approval similar to the adverse possession or rights of prescription. It is said that the right to be a slave is the cornerstone of the right-to-work statutes and their legislative policy. It is further said that this State has now returned to the days of 1840 in its labor outlook; and the charge, as laid in the North Carolina warrant, is substantially similar to the charge made in the case of *COMMONWEALTH v. HUNT*, 4 Metc. 111 (Mass.). Cases are also

cited from which it is said that legal approval has been given to the closed-shop method. The evolution of the labor movement is commented upon, and it is said, in substance, that a single employee is helpless in dealing with an employer and that the State of North Carolina has again resorted to the attitude that "it seems quite natural for the employer to fix the conditions of employment to which all persons seeking employment with him must submit."

Appellants' analogy wherein the closed shop is compared to the ancient practices of the Crafts and Gilds of the Middle Ages is not exactly sound. These institutions were engaged in production for use and in last analysis were associations of persons who wished to become proprietors or entrepreneurs in their own right. This is explained in the book entitled: "Development of Economic Society," by Modlin and de Vyver (D. C. Heath & Company, Boston, 1946). On this subject, these authors say:

"In no sense did the gild resemble a modern trade union. Though it was a union of all members of a particular trade, this included journeymen, apprentices, and also the masters, who were enterprisers and employers as well as craftsmen. The modern trade union does not accept the employer as a member. The inclusion of the entire group in the medieval gild was made possible because there was at that time no class of permanent wage earners in the modern sense of the term. In those days a man expected to be a journeyman only for a few years until he could save the small amount needed to establish himself as a master, or, possibly by marrying his master's daughter, to become a partner in his business."

This argument, by way of ancient lineage, even if exact, by no means proves that custom or institution arising

under the provincial economy of feudal days should be allowed to continue and prevail when it disturbs a public welfare which is supported by an intricate and interdependent economic structure. Manifestly, the closed shop must be examined in terms of the present power of unions and not in terms of the political and economic life of former generations. We do not desire to return to the days of the past in our outlook upon labor with its well-known labor spy and strike breaker and many other employer abuses. The fact that the capitalistic system or structure of economy, in its development from feudal days to the present time, has committed many sins or practiced many abuses does not authorize labor unions to travel the same road. We no longer have one man against an employer, but what we have today is one man against one union. Unions are no longer mere associations of workingmen and small private groups. This is shown by Slichter in his book on the "Challenge of Industrial Relations". On page 14 of his discussion, he says:

"Unions have tremendous power. No longer do they cover a small fraction of the work force. About seven million jobs in American industry may be held only by men who are union members or whom unions are willing to accept as members. About eleven million employees who work in union shops or closed shops or under maintenance-of-membership clauses hold their jobs only so long as they keep in good standing in their unions. No longer are most unions underdogs. The strongest unions, as I have pointed out, are the most powerful economic organizations which the country has ever seen. One cannot conceive of the railroads, even if they were not bound by law to render continuous service, daring to cut off the country from railroad service. Steel producers would not dare com-

bine for the purpose of depriving the country of steel; no combination of coal operators would dare cut off the supply of coal. Yet in each of these industries during the last year unions have not hesitated to stop production in order to enforce their demands—in some cases, very trivial demands.”

The individual workingman is now up against the problem of the closed union with its discriminations (Volume 56, *Yale Law Journal*, pp. 731-737), with dictatorial union discipline enforced by vague rules and indefinite charges for the purpose of expulsion, with union legislation adopted by a far away national executive committee, and in many cases, with no disinterested appellate bodies to review the judgments of this private government. (See “Democracy in Trade Unions, American Civil Liberties Union,” See also “Union Policies in Industrial Management” by Slichter, the Brookings Institution, Washington, D. C., 1941.)

Judicial approval, of course, has been divided; and it will do no good to array legal authorities one against the other.

Appellants say that the right of labor to organize and bargain collectively is a constitutionally-protected right, and the right of assembly and free speech extends to any action that a trade union may take so long as such action is necessary and indispensable for the maintenance of the trade union. Thus the right to assemble and discuss objectives freely draws within the orbit of protection afforded by the First Amendment any act or course of action previously agreed upon in an assembly. We, therefore, have the spectacle of collective action produced by an assembly, conferring rights that are not given to any business association or, in fact, to any other group in the nation. If appellants' contentions are sound, then the private rules

of a union previously agreed upon by its executive committee are far superior to the rules of action enacted by the constitutional political agency of a sovereign state. This same argument will, in turn, support and justify the use of a company union or indeed any act of violence, provided, always, it is decided in an assembly that it was necessary and indispensable to the maintenance of a trade union.

It is evident from appellants' argument that their goal is the all-inclusive union shop on a national basis. It is said that workingmen are born into an economic society and that this society is governed by the unions; that by virtue of collective action, unions, therefore, have the powers of government and are, therefore, to be exercised without any correlative responsibilities. There must be elimination of non-union wage differentials, both outside and inside any particular plant or industry; that this is necessary for equality of bargaining power and to protect a union organization. If all non-union wage differentials are gradually eliminated and if it is necessary and indispensable to have the closed shop to protect trade unions, it is hard to see how appellants can escape the position that a union-controlled monopoly of labor has become a constitutional right because, as they say, it is indispensable and necessary. It is true that appellants seek to qualify their position by using such phrases as "right of workers to take action not independently unlawful," and "in the absence of compelling public necessity." This, however, is only a way of evading the question since the legislative branch of the Government of the State of North Carolina has said that the means is "independently unlawful," and that there exists "compelling public necessity."

Appellants, in their brief, discuss at length the rise and evolution of the legal right of workingmen to combine to-

gether and organize trade unions. The existence and constitutional protection of this fundamental right is not denied by appellee. The North Carolina statute does not prohibit or under the guise of regulation destroy this right. The use of injunctions is not authorized. The statute says that an employer, as a condition of employment or continuation of employment, cannot: (a) require a person to become or remain a member of a labor union; (b) require a person to pay any dues, fees or charges to a labor union; (c) require a person to abstain or refrain from membership in any labor union; (d) that an agreement between an employer and a labor union: (1) denying the right to work to non-union men; or (2) requiring union membership as a condition of employment; or, (3) continuation of employment; or, (4) an agreement whereby a union acquires an employment monopoly in any enterprise; such agreement containing any or all of these elements shall constitute an illegal combination or conspiracy in restraint of trade or commerce in the State of North Carolina.

The statute does not deny freedom of speech and assembly; it does not deny the right to organize; it does not prohibit contracts between employers and employees as to wages, hours and working conditions in the form of union agreements or otherwise. There is no proscription of collective bargaining.

Appellants, by a strong and studied effort, try to create the impression that the right to organize, collective bargaining and the closed shop are all one and the same thing; and that modern unionism cannot exist without the necessary and indispensable closed shop.

It is apparent that appellants' argument is based upon two assumptions: (1) unions are necessary to protect

workers, and (2) that the only way unions can continue to exist is by the use of the closed shop. We may grant the first assumption without in anywise granting the second. Certainly, whether or not the closed shop is necessary for union existence, it must be examined outside of this second assumption made by appellants. It cannot be disputed that the closed shop makes membership in a trade union necessary if the worker is to live and maintain his family. There might be some basis for this position if the State regulated union membership, such as, admission, dues, dismissals, and the like. The fact is, however, that trade unions insist that membership is like membership in a private club. They insist that they shall determine who shall belong, how much they shall pay and when and for what grounds a member may be dismissed. This puts into the hands of an unregulated private organization the complete control of the economic well-being of the people. We have no evidence that unions are endeavoring to establish democratic procedures in their internal organizations. They have no free press, no party system, no division of legislative and judicial and no real limitations on lengths of term of office for union leaders. There is, therefore, no protection for the minority in modern trade unionism.

Appellants' argument derived from certain Federal statutes is best disposed of by a quotation from the opinion of Mr. Justice Seawell in this case (*STATE v. WHITAKER, supra*):

"The most comprehensive gains made by labor have unquestionably been made in the field of Federal legislation. It is neither possible nor necessary for us to do more than highlight those gains in this opinion. The Clayton Act in 1914 restricted the use of the injunction in labor disputes in an effort to correct an

almost universally recognized abuse of that judicial process. This marked the first major step taken by Congress in enacting rules beneficial to labor in its conflict with management. However, it fell far short of its purpose and the Norris-LaGuardia Act in 1932 further and more specifically restricted the use of the injunction in addition to prohibiting 'yellow dog contracts' and limiting the liability of union officials. In 1935 Congress enacted the National Labor Relations Act declaring the public policy of the United States to be the encouragement of collective bargaining and the protection of 'the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.' To safeguard those rights the Act prohibited five specified types of unfair employer practices. It further provided for the settlement of questions as to who are to represent employees, and it specifically preserved the right to strike. Among other provisions of the Act was the authorization of closed shop agreements with the specific limitation that nothing contained in the Act would permit such agreements in states under whose laws they were illegal.

"Perhaps it might be said with the passage of The National Labor Relations Act, 'the labor movement has come full circle.' Perhaps that statute only marked a temporary high point in the progress of labor which will some day be surpassed. We cannot know now, and our feelings in the matter have no bearings upon the case at hand. What is more important to a consideration of this case is that Congress contemporaneously with the adoption of Chapter 328, by the North Carolina General Assembly, determined that it had gone too far in licensing weapons which labor might use in obtaining its ends and that further re-

restrictions thereon were necessary in the public interest. The Taft-Hartley Act, was primarily adopted for that purpose. The purpose and provisions of that statute, therefore, become highly important to a consideration of the contemporary conditions out of which Chapter 328 also emerged.

"Section 1 of the National Labor Relations Act has found, as a basis for that statute, that the national welfare had been adversely affected by several stated malpractices of management in its dealings with labor. Section 1, of the Taft-Hartley Act restated those findings on the basis of evidence considered by Congress, finding that both labor and management were guilty of acts in their relationship to each other which necessitated mutual regulation in the public interest. The industrial strife and disruption of the national economy which led to this finding of dual responsibility and blame are briefly summarized in the reports which accompanied the Senate and House Bills and the conference committee's report at the adoption of the Taft-Hartley Act of 1947.

"Section 7 of the Taft-Hartley Act prohibits the narrowly defined closed shop, and Section 8 (3) permits a union shop subject to certain conditions. Section 14 (b) supplements these sections by providing:

"(b) Nothing in that Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial Law."

THE NORTH CAROLINA STATUTE DEALS ONLY WITH ECONOMIC
AND NOT PERSONAL RIGHTS.

The appellants' contention, that the right-to-work statutes can be supported only by a showing of compelling

public necessity under the clear and present danger test, is fundamentally unsound, and its major premise false. In cases where state legislation amounts to a restriction or deprivation of an "economic" claim of right relating to the use of property or to the making of contracts, only the "test of reasonableness" need be met in order to give validity to the enactment. (This proposition is ably supported in appellants' own Economic Brief, Appendix E, quoting an article entitled STATE LEGISLATION BANNING UNION-SECURITY AGREEMENTS: THE DUE PROCESS ISSUE AND JUDICIAL SELF-RESTRAINT, written by Joseph P. Witherspoon, Jr., and appearing in the Texas Law Review, Vol. XXVI, for November, 1947, No. 1, page 47.) Where the "test of reasonableness" is applied to a challenged state statute, a presumption of constitutionality attaches to the statute. *BORDEN'S FARM PRODUCTS CO. v. BALDWIN*, 293 U. S. 194, 209, 55 S. Ct. 187. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it. *MADDEN v. KENTUCKY*, 309 U. S. 83, 88, 60 S. Ct. 406. As far as the proponents of the bill are concerned . . . "due process . . . demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained." *NEBBIA v. NEW YORK*, 291 U. S. 502, 525, 54 S. Ct. 505.

It is only where the complained of restriction, or deprivation, is of a "personal" claim of right, such as freedom of the press and of speech, that the clear and present danger test is applied. *THORNHILL v. ALABAMA*, 310 N. C. 88, 60 S. Ct. 736; *SCHENCK v. UNITED STATES*, 249 U. S. 47, 39 S. Ct. 247; *THOMAS v. COLLINS*, 323 U. S. 516, 65 S. Ct. 315. The right-to-work statutes do not restrict or

prohibit any personal rights. The right to organize and maintain a union is not affected, nor is the right to strike and the right to picket. It is only the contract-making privilege of workers that is affected and the contract-making privilege is purely economic in nature. As was said in STAPLETON v. MITCHELL, 60 Fed. Supp 51, 61:

"As we have said, the process of self-organization, collective bargaining and all other allied union activities necessarily involve the rights of free speech, press and assembly which may not be conditioned by statute or previous restraint by injunctive process, but we must also recognize that the sum and total of all union activities are directed toward economic objectives and necessarily involve purely commercial activities which may be regulated in the public interest on any reasonable basis. In short, when used as an economic weapon in the field of industrial relations or as coercive technique, speech, press and assembly are subject to reasonable regulation in the public interest and in that respect the state is the primary judge of the need, and it is not required to wait until the danger to the community which it seeks to avoid is 'clear and present.'"
(Emphasis supplied)

This Court recognized the economic, as opposed to the personal, aspect of labor organizations in U. S. v. WHITE, 322 U. S. 694, 64 S. Ct. 1248, where Mr. Justice Murphy, speaking for the Court, said:

"Structurally and functionally, a labor union is an institution which involves more than the private or personal interests of its members. It represents organized, institutional activity as contrasted with wholly individual activity," and individuals while "acting as representatives of a collective group, cannot be said to be exercising their personal rights and duties and to be

entitled to their purely personal privileges. Rather they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligations."

It was also stated in *AMERICAN FEDERATION OF LABOR v. WATSON*, 60 Fed. Supp. 1010, 1016, that:

"Collective bargaining, self-organization, and other kindred union activities necessarily involve the rights of free speech, freedom of the press, freedom of assembly, and freedom of petition, which may not be denied by state statute or constitution, but *we also must recognize that the total of union activity is directed toward economic objectives which involve purely commercial activities and which may be regulated by the state upon any reasonable basis when not in conflict with superior law.*" (Emphasis supplied)

For the appellant to assert that the right-to-work statutes infringe upon the constitutional right to organize, and the attendant rights to strike and to picket is an unwarranted conclusion. There is no attempt to prohibit joining a union, —the prohibition is against requiring membership in a union in order for a citizen to be eligible for work. Freedom of choice by the worker in regard to affiliation with a labor union has long been declared by the United States Congress to be one of the ends sought by its labor legislation. This is illustrated by the Norris-LaGuardia Act, and the National Labor Relations Act, among the purposes of which was to accord to employees full freedom to belong or not to belong to a labor union. See Norris-LaGuardia Act, 2, 29 U.S.C.A. 102; National Labor Relations Act 1, to 16, 29 U.S.C.A. 151 to 166. Also see Senate Report No. 105, 80th Congress, 1st Session, pp. 5, 6, 7. The right-to-work

statutes assailed by appellants are but expressions by the state legislature of the policy already sanctioned and approved by the Congress.

In attempting to support their contention that the clear and present danger test is the only one which can here be applied, the appellants again rely on the THOMAS, BARNETTE and THORNHILL cases which they previously cited in attempting to show that the right-to-work statute is an infringement on the right to organize. Those cases have already been distinguished from the case at bar. The same distinctions apply in this instance and their further elaboration is unnecessary. At this point, it would be appropriate to recall again that principle so succinctly stated in AMERICAN FEDERATION OF LABOR v. WATSON, *supra*:

"Labor and labor unions are affected with the public interest and are subject to the regulatory power of the states for any reasonable regulation which will not be inconsistent with the Constitution of the United States and statutes enacted within the scope delegated by the Constitution to the Congress." (Emphasis supplied)

II

EMPLOYMENT CONTRACTS ARE SUBJECT TO THE POLICE POWER, AND THE RIGHT TO WORK STATUTE IS A VALID EXERCISE OF THE POLICE POWER.

We propose to discuss now the only question stressed by appellants in the State Courts: Can the North Carolina statute be sustained as a reasonable and valid exercise of the police power?

In their brief, appellants say:

"We do not say, nevertheless, that all contracts requiring union membership as a condition of employment are beyond the reach of state power. Interests there may be, both public and private, which might justify regulation of the circumstances under which such contracts may be made. Obligations to society and to private persons, may perhaps be imposed upon both labor organizations and employers who function under such agreements."

The THOMAS case, *supra*, so strongly relied on by the appellants, itself states that the State has power to regulate labor unions. "They cannot claim special immunity from regulation Espousal of the cause of labor is entitled to no higher constitutional protection than the espousal of any other lawful cause."

The police power has been defined by this Court as "an exercise of the sovereign right of government to protect the lives, health, morals, comfort and general welfare of the people." HOME BUILDING AND LOAN ASSOCIATION v. BLAISDELL, 290 U. S. 398, 54 S. Ct. 231. The principle of the police power and its application is well set forth in the land-mark decision of NEBBIA v. NEW YORK, 291 U. S. 502, 54 S. Ct. 505. In the NEBBIA case, the question for decision was whether the New York statute fixing the minimum selling price for milk violated the due process and equal protection clauses of the Fourteenth Amendment of the Federal Constitution. This Court sustained the validity of the New York law, stating in part:

"The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects State action, do not prohibit governmental regulation for the public wel-

fare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that *the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.* * * * * So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or when it is declared by the legislature, to over-ride it. If the laws passed are seen to have a *reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied*, and judicial determination to that effect renders a court functus officio. * * * * *With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal.* The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that *the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.*" (Emphasis supplied.)

That the complaint of legislation might make inroads into the freedom of contract is not a bar to the valid exercise of the police power of the State. In the words of the

Court in CHICAGO B. & Q. R. CO. v. McGUIRE, 219 U. S. 566, 31 S. Ct. 259:

"But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified, and not an absolute, right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. *Crowley v. Christensen*, 137 U. S. 89, 34 L. ed. 621, 11 Sup. Ct. Rep. 13; *Jacobson v. Massachusetts*, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 A. & E. Ann. Cas. 765. . . . The right to make contracts . . . is subject, also, in the field of state action, to the essential authority of government to maintain peace and security, and to enact laws for the promotion of the health, safety, morals, and welfare of those subject to its jurisdiction. This limitation has had abundant illustration in a variety of circumstances. Thus, in addition to upholding the power of the state to require reasonable maximum charges for public service (*Minn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Chicago, B. & Q. R. Co. v. Iowa* (*Chicago, B. & Q. R. Co. v. Cutts*) 94 U. S. 155, 24 L. ed. 94; *Railroad Commission Cases*, 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; *Willcox v. Consolidated Gas Co.* 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 A. & E. Ann. Cas. 1034), and to prescribe the hours of labor for those employed by the state or its municipalities (*Atkin v. Kansas*, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124), this court has sustained the validity of state legislation in prohibiting the manufacture and sale of intoxicating liquors within the state (*Mugler v. Kansas*, 123 U. S. 623, 31 L. ed.

205, 8 Sup. Ct. Rep. 273; *Crowley v. Christenden*, *supra*); in limiting employment in underground mines or workings, and in smelters and other institutions for the reduction or refining of ores or metals, to eight hours a day, except in cases of emergency (*Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383); in prohibiting the sale of cigarettes without license (*Gundling v. Chicago*, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633); in requiring the redemption in cash of store orders or other evidences of indebtedness issued in payment of wages (*Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1); in prohibiting contracts for options to sell or buy grain or other commodity at a future time (*Booth v. Illinois*, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425); in prohibiting the employment of women in laundries more than ten hours a day (*Muller v. Oregon*, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 A. & E. Ann. Cas. 957); and in making it unlawful to contract to pay miners employed at quantity rates upon the basis of screened coal, instead of the weight of the coal as originally produced in the mine (*McLean v. Arkansas*, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206)."

And as was said in *FRISBIE v. U. S.*, 157 U. S. 160, 166, 15 S. Ct. 586, and repeated in the *McGUIRE* case, *supra*:

"While it may be conceded that, generally speaking, among the inalienable rights of the citizen is that of the liberty of contract, yet such liberty is not absolute and universal. It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligations, except for the necessities of existence; to the common carrier the power to make

any contract releasing himself from negligence, and, indeed, *may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services, or property.*" (Emphasis supplied)

That employment contracts and labor management relations are subject to the police power is well settled by the case of *WEST COAST HOTEL CO. v. PARRISH*, 300 U. S. 379, 57 S. Ct. 578. There this Court upheld, as a valid exercise of the police power, a law of the State of Washington which authorized the fixing of minimum wages for women. The Court specifically reaffirmed its holding in the *NEBBIA* case, quoting the same language from it that is set out above, as the test by which to judge the proper exercise of the police power. In elaborating on the police power of the State in regard to employer-employee contracts, the Court went on to say:

"This power under the Constitution to restrict freedom of contract has had many illustrations. That it may be exercised in the public interest with respect to contracts between employer and employee is undeniable. Thus statutes have been sustained limiting employment in underground mines and smelters to eight hours a day (*Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383); in requiring redemption in cash of store orders or other evidences of indebtedness issued in the payment of wages (*Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 46 L. ed. 55, 22 S. Ct. 1); in forbidding the payment of seamen's wages in advance (*Patterson v. The Eudora*, 190 U. S. 169, 47 L. ed. 1002, 23 S. Ct. 321); in making it unlawful to con-

tract to pay miners employed at quantity rates upon the basis of screened coal instead of the weight of the coal as originally produced in the mine (*McLean v. Arkansas*, 211 U. S. 539, 53 L. ed. 315, 29 S. Ct. 206); in prohibiting contracts to employees (*Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 55 L. ed. 328, 31 S. Ct. 259, *supra*); in limiting hours of work of employees in manufacturing establishments (*Bunting v. Oregon*, 243 U. S. 426, 61 L. ed. 830, 37 S. Ct. 435, *Ann. Cas.* 1918A, 1043); and in maintaining workmen's compensation laws (*New York C. R. Co. v. White*, 243 U. S. 188, 61 L. ed. 667, 37 S. Ct. 247, *L. R. A.* 1917D, 1; *Mountain Timber Co. v. Washington*, 243 U. S. 219, 61 L. ed. 685, 37 S. Ct. 260, 13 N.C.C.A. 927, *Ann. Cas.* 1917D, 642). In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. *Chicago, B. & Q. R. Co. v. McGuire*, *supra* (219 U. S. p. 570, 55 L. ed. 339, 31 S. Ct. 259).":

Statutes which forbid employers to blacklist former employees, or to seek to prevent their obtaining employment elsewhere are valid as a proper exercise of police power.

State v. Justus, 85 Minn. 279, 88 N. W. 759;

Johnson v. Oregon S. Co., 128 Ore. 121, 270 P. 772.

This State has had in effect statutes enacted in 1909 which prevent the blacklisting of employees or conspiring to blacklist them.

G. S. 14-355;

G. S. 14-356.

Likewise, statutes have been enacted by other states aimed to mitigate the economic and social consequences of unemployment.

Chamberlain, Inc. v. Andrews, 271 N. Y. 1, 2 N. E. (2d) 22. Affirmed: 299 U. S. 515, 57 S. Ct. 122.

Carmichael v. Southern C. & C. Co., 301 U. S. 495, 57 S. Ct. 868.

Statutes prohibiting interference with or intimidation of employees (*PEO. v. WASHBURN*, 285 Mich. 119, 280 N. W. 132, appeal denied; 305 U. S. 577, 59 S. Ct. 355) are within the police power of the State. And see the dissenting opinions in *COPPAGE v. KANSAS*, 236 U. S. 1, 35 S. Ct. 240, 248.

This position of the United States Supreme Court in regard to employer-employee contracts, as well as other relationships, was reaffirmed in *NATIONAL LABOR RELATIONS BOARD v. JONES & LAUGHLIN STEEL CORPORATION*, 301 U. S. 1, 57 S. Ct. 615, in which case the validity of the National Labor Relations Act was sustained; and again in *U. S. v. DARBY*, 312 U. S. 100, 61 S. Ct. 451, holding, on the authority of the *PARRISH* case, *supra*, that the Federal Fair Labor Standards Act is a constitutional enactment; and still again in *PHELTS DODGE CORPORATION v. NATIONAL LABOR RELATIONS BOARD*, 333 U. S. 177, 61 S. Ct. 845, where the Court upheld the provision of the National Labor Relations Act that it "shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or in term or condition of employment to encourage or discourage membership in any labor organization. Indeed the Court in that case went so far as to say:

"The course of decisions in this Court since *Adair v. U. S.*, 208 U. S. 161, and *Coppage v. Kansas*, 236 U. S. 1, have completely sapped those cases of their authority."

PRESUMPTION AS TO NECESSARY SUPPORTING CIRCUMSTANCES
AND JUDICIAL VIEWPOINT.

It is well settled that an Act of the Legislature is presumably valid. *BROWN v. MARYLAND*, 25 U. S. 419, 6 L. ed. 678. As pointed out in *PLANTERS BANK OF MISSISSIPPI v. SHARP*, 47 U. S. 301, 12 L. ed. 447, Legislatures must be presumed to act from public consideration, being in high public trust, and when their measures relate to matters of general interest, and can be vindicated under express or justly implied powers, and more especially when they appear intended for improvements or for salutary reforms of abuses, the disposition in the judiciary should be strong to uphold them.

"We assume that the Legislature acts according to its judgment for the best interest of the State." *FLORIDA C. & P. R. CO. v. REYNOLDS*, 183 U. S. 471, 480.

That each act of legislation is presumed to be in the interest of the public and that the burden is on him who attacks the legislation to show that it is not within the legislative power has been made clear by the Supreme Court of the United States on many occasions. As pointed out in the cases herein cited, the function of the Court is only to ascertain whether or not there existed any reasonable basis for the Legislature enacting the law which was passed. The selection of the subjects of legislation and the conclusions reached by the law-making body is within this constitutional limitation essentially and peculiarly their

own function, which cannot be taken from them by judicial action.

"But liberty of making contracts is subject to conditions in the interest of the public welfare, and which shall prevail—principle or condition—cannot be defined by any precise and universal formula. Each instance of asserted conflict must be determined by itself, and it has been said many times that each act of legislation has the support of the presumption that it is an exercise in the interest of the public. The burden is on him who attacks the legislation, and it is not sustained by declaring a liberty of contract. It can only be sustained by demonstrating that it conflicts with some constitutional restraint, or that the public welfare is not subserved by the legislation. *The legislature is, in the first instance, the judge of what is necessary for the public welfare, and a judicial review of its judgment is limited. The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance.* CHICAGO B & Q RR CO. v. McGUIRE, 219 U. S. 549, 562, 55 L. ed. 328, 336, 31 Sup. Ct. Rep. 259; GERMAN ALLIANCE INS. CO. v. LEWIS, 233 U. S. 389, 58 L. ed., 34 S. Ct. Rep. 612." ERIE R. CO. v. WILLIAMS, 233 U. S. 685, 34 S. Ct. 761. (Emphasis ours).

"We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution." EX PARTE McCARDLE, 7 Wall, 506, 514.

"The rule is general, with reference to the enactments of all legislative bodies, that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the fact of the acts, or inferable from their operation, considered with reference to the condition of the country and existing

legislation." *SOON HING v. CROWLEY*, 113 U. S. 703, at 710, 5 S. Ct. 730.

"Being a legislative judgment it is presumed to be supported by facts known to the legislature unless facts judicially known or proved precluded that possibility. Hence, in reviewing the present determination, we examine the record not to see whether the findings of the court below are supported by the evidence, but to ascertain upon the whole record whether it is possible to say that the legislative choice is without rational basis." *SOUTH CAROLINA HIGHWAY DEPT. v. BARNWELL BROS.*, 303 U. S. at 191, 58 S. Ct. 510.

"Hence, in passing on the validity of the present classification, it is not the province of a court to hear and examine evidence for the purpose of deciding again a question which the legislature has already decided. *Its function is only to determine whether it is possible to say that the legislative decision is without rational basis.*" (Emphasis ours) *CLARK v. PAUL GRAY*, 306 U. S. 583, 594, 59 S. Ct. 744.

"... The extent to which, as means, they conduce to that end, the degree of their efficiency, the closeness of their relation to the end sought to be attained, are matters addressed to the judgment of the legislature, and not that of the courts. *It is enough if it can be seen that in any degree, or under any reasonably conceivable circumstances, there is an actual relation between the means and the end.*" (Emphasis ours) *STEPHENSON v. BINFORD*, 287 U. S. 251, 272, 53 S. Ct. 181.

"We need not labor the point, long settled, that where legislative action is within the scope of the police power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts, but for that of the legislative body on

which rest the duty and responsibility of decision. *Zahn v. Board of Public Works*, 274 U. S. 325, 238, 71 L. ed. 1074, 1076, 47 Sup. Ct. Rep. 495; *Hadacheck v. Sebastian*, 239 U. S. 394, 408-414, 60 L. ed. 348, 355-358, 36 Sup. Ct. Rep. 143, Ann. Cas. 1917B, 927; *Euclid v. Ambler Realty Co.*, 272 U. S. 365, 388, 71 L. ed. 303, 310, 54 A.L.R. 1016, 47 Sup. Ct. Rep. 114; *Jacobson v. Massachusetts*, 197 U. S. 11, 30, 49 L. ed. 643, 651, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; *Laurel Hill Cemetery v. San Francisco*, 216 U. S. 358, 365, 54 L. ed. 515, 518, 30 Sup. Ct. Rep. 301; *Thos. Cusack Co. v. Chicago*, 242 U. S. 526, 530, 61 L. ed. 472, 475, L.R.A. 1918A, 136, 37 Sup. Ct. Rep. 190, Ann. Cas. 1917C, 594; *Price v. Illinois*, 238 U. S. 446, 451, 59 L. ed. 1400, 1404, 35 Sup. Ct. Rep. 892." *STANDARD OIL CO. v. MARYSVILLE*, 279 U. S. 582, 584, 73 L. ed. 859.

"The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy*. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance." *CHICAGO, B. & Q. R. CO. v. McGUIRE*, 219 U. S. 549, 569, 55 L. ed. 339.

"Nor can we declare the provisions void because it might seem to us that they enforce an objectionable policy or inflict hardship in particular instances. *Chicago, B. & Q. R. Co. v. Nebraska*, 170 U. S. 57, 77, 42 L. ed. 948, 955, 18 S. Ct. 513. And see, generally, *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 55 L. ed. 328, 31 S. Ct. 259. Whether the enactment is

wise or unwise," this court said in that case (p. 569), "whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance." (Emphasis ours) *BAYSIDE FISH FLOUR CO. v. GENTRY*, 297 U. S. 422, 428, 80 L. ed. 776.

"The legislature, being familiar with local conditions, is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power. *Jacobson v. Massachusetts*, supra; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Minnesota v. Barber*, 136 U. S. 313, 320; 34 L. ed. 455, 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Atkin v. Kansas*, 191 U. S. 207, 223, 48 L. ed. 148, 158, 24 Sup. Ct. Rep. 124.

"If the law in controversy has a reasonable relation to the protection of the public health, safety, or welfare, it is not to be set aside because the judiciary may be of opinion that the act will fail of its purpose, or because it is thought to be an unwise exertion of the authority vested in the legislative branch of the government." *McLEAN v. ARKANSAS*, 211 U. S. 539, 548, 53 L. ed. 319.

Also see:

Nashville, etc. R. Co. v. White, 278 U. S. 456, 49 S. Ct.

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Tanner v. Little, 240 U. S. 369, 36 S. Ct. 379

Arizona Copper Co. v. Harbinger, 250 U. S. 490, 39 S. Ct.

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Gant v. Oklahoma City, 289 U. S. 98, 53 S. Ct. 539

ECONOMIC BRIEF

Appellants stress the importance of an economic brief for the purpose of resolving any questions arising upon state action as measured and tested by the Fourteenth Amendment. In their zeal for this form of presentation, appellants assert: "It is now held that any judgment concerning the reasonableness or unreasonableness of any particular legislation must be an informed judgment based upon as precise and accurate information as obtainable concerning existing economic or social conditions involved in and justifying the attempted exercise of the police power." Appellants cite certain cases and law review articles in support of this position. This method of approach is suggested by Mr. Witherspoon in his article (26 Texas Law Review, pp. 59, 60) upon the assumption that this Court will invent a new doctrine called "substantial negation" in order to invalidate state statutes in this field.

Appellee admits that there are certain cases in which relevant information and technical data obtained from official, semi-official and expert sources are helpful in determining whether state action is within or without the proper channel of reserved police power. In so far as economic and social conditions enter into the judicial determination, it would seem that any relevant information by way of judicial notice or as may be presented by counsel may be

considered if the same is persuasive. The inclusion of such material in a separate brief designated "Economic Brief" does not, however, bring about a complete metamorphosis so as to endow this type of knowledge with mystical and inerrant virtues. We intend to use such materials as a part of this brief, but statistical data aside, it will consist of the conclusion and opinions of men. On this point, appellants' contention carried to its logical end would place this case before a board of economists and sociologists for decision, rather than before this Court for consideration and application of constitutional principles. This represents another attempt on the part of appellants to convert this case into an economic issue rather than a legal problem: to establish a ratio decidendi of "influence pressures," "economic pressures" and an "adequate share of the joint products of capital and labor." In so far as appellants' criterion obscures and destroys fundamental legal concepts as to the constitutional rights and powers of a state to protect its own citizens and the general public, we deny its validity. Appellants' position would reduce the general public to the status of a spectator on the sidelines while two economic titans, capital and labor, wage economic war to the bitter end for the prize of total economic control of the various states and the nation. We assert that a state has a right to experiment in its methods of control and regulation as authorized by the police power even though the reasons and motives may seem novel and cannot be squared with current economic and social ideologies. To this extent, at least, "precise and accurate information" cannot control established constitutional rules and principles.

That the use of facts on constitutional issues has its limitations is shown by an article cited by appellants. In 40 Harvard Law Review, 960, 961, 962 (Brown: Due Pro-

cess, Police Power, and the Supreme Court), the author says:

"Fortunately, the present tendency is toward a closer scrutiny of the factual situation and, in the case of certain of the justices, toward a general use of scientific testimony. The use of such expert testimony is not, however, a universal solution of the problem. Police power cases inevitably present two questions of fact: (1) the present situation; (2) the probable effect of the state's interference. As to the first question, it is true that great difficulty is not always experienced. It is not hard to determine whether long hours of labor have a deleterious effect on the health of workers, or whether certain solicitors on trains to Hot Springs, Arkansas, are a nuisance, or whether the payment of a miner's wage on the basis of screened coal tends to defraud the laborer. But the question is not always so clear. In nearly every business or practice there exist along with the dangers to society, undoubted benefits. If oleomargarine and 'filled milk' may be manufactured so as to be unhealthy and sold so as to work a fraud, there is in the cheaper products a boon to the man unable to afford the better ones. The difficulty of proof is intensified when large and widespread businesses are concerned. Can economists definitely answer the question whether stock and produce exchanges are a benefit or an evil? Can it be said with confidence that the use of trading stamps demoralizes the people by inciting reckless buying? Can statistics prove that the private school does or does not produce a better citizenry than an exclusive public school system? In such matters the opinion of the expert, the economist, and the governmental bureau should be received and respected, but they do not become science by bearing the stamp of government, university, or technical magazine. As to the right of employment agencies to exist, a conclusion even of a

Congressional Committee that 'the necessity of paying for the privilege of going to work, and paying more the more urgently the job is needed, not only keeps people unnecessarily unemployed, but seems foreign to the spirit of American freedom and opportunity; does not become scientific fact because of the source of its emanation. Whether the undoubted evils of the agencies justified their abolition, remained a question not of fact but of opinion.

"Difficulties are enhanced when we proceed from a consideration of the *status quo* to the probable effect of the means adopted to ameliorate that status. The vaccination case was perhaps easy but the feasibility of preventing fraud in the sale of bread by requiring a loaf to have a definite weight twenty-four hours after baking, was a closer question, and there is a total lack of accurate evidence as to the effect which minimum wage statutes would have on the condition of the poorer paid. When it is remembered that the Court also inquires whether the means proposed are 'unusual, unnecessary, or oppressive,' it is seen that we are indeed passing from the realm of objective fact into that of subjective belief. Whether it is unreasonable and oppressive to secure industrial peace by compelling employer and employee to arbitrate; to obtain a homogeneous people by preventing the teaching of foreign languages to small children; to secure cheaper housing by compelling the landlord to decrease his rents; and to alleviate the poverty of the servants by requiring that the master increase her wages, are questions bottomed not on law or science but on one's inherited or acquired opinions of history, politics and economics."

Scientific precision, even when possible, is not the test of constitutionality. In *SPROLES v. BINFORD*, 286 U. S. 374, 52 S. Ct. 581:

"To make scientific precision a criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure. OHIO OIL CO. v. CONWAY, 281 U. S. 146, 159. When the subject lies within the police power of the State, debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome. STANDARD OIL CO. v. MARYSVILLE, 279 U. S. 582, 586; PRICE v. ILLINOIS, 238 U. S. 446, 452, 453; HADACHEK v. LOS ANGELES, 239 U. S. 394, 410; EUCLID v. AMBLER REALTY CO., 272 U. S. 365, 388; ZAHN v. BOARD OF PUBLIC WORKS, 274 U. S. 325, 328."

In passing on a state conservation statute (R. R. COMMISSION v. OIL CO., 311 U. S. 570, 61 S. Ct. 343), this Court said:

"The constitution does not provide that the federal courts shall strike a balance between ascertainable facts and dubious inferences underlying such a complicated and elusive situation as is presented by the Texas Oil fields in order to substitute the court's wisdom for that of the legislative body. STANDARD OIL CO. v. MARYSVILLE, 279 U. S. 582."

In upholding a statute fixing the fee that could be charged by private employment agencies (OLSEN v. NEBRASKA, 313 U. S. 236, 61 S. Ct. 862), this Court said:

"But respondents maintain that the statute here in question is invalid for other reasons. They insist that

special circumstances must be shown to support the validity of such drastic legislation as price-fixing, that the executive, technical, and professional workers which respondents serve have not been shown to be in need of special protection from exploitation, that legislative limitation of maximum fees for employment agencies is certain to react unfavorably upon those members of the community for whom it is most difficult to obtain jobs, that the increasing competition of public employment agencies and of charitable, labor union and employer association employment agencies have curbed excessive fees by private agencies, and that there is nothing in this record to overcome the presumption as to the result of the operation of such competitive, economic forces. And in the latter connection respondents urge that, since no circumstances are shown which curb competition between the private agencies and the other types of agencies, there are no conditions which the legislature might reasonably believe would redound to the public injury unless corrected by such legislation.

"We are not concerned, however, with the wisdom, need, or appropriateness of the legislation. Differences of opinion on that score suggest a choice which 'should be left where . . . it was left by the Constitution—to the States and to Congress.' *RIBNIK v. McBRIDE*, *supra*, at p. 375, dissenting opinion. There is no necessity for the state to demonstrate before us that evils persist despite the competition which attends the bargaining in this field."

In passing on moratory legislation of the State of New York (*EAST N. Y. BANK v. HAHN*, 326 U. S. 230, 66 S. Ct. 69):

"On the basis of expert opinion, documentary evidence, and economic arguments of which we are to

take judicial notice, it urges such a change in economic and financial affairs in New York as to deprive of all justification the determination of New York's Legislature of what New York's welfare requires. We are invited to assess not only the range and incidence of what are claimed to be determining economic conditions insofar as they affect the mortgage market—bank deposits and war savings bonds; increased payrolls and store sales; available mortgage money and rise in real estate values—but also to resolve controversy as to the causes and continuity of such improvements, namely the effect of the war and of its termination, and similar matters. Merely to enumerate the elements that have to be considered shows that the place for determining their weight and their significance is the legislature not the judiciary.”

In the case of *LA TOURETTE v. McMASTERS*, 248 U. S. 465, 39 S. Ct. 160:

“But we need not cast about for reasons for the legislative judgment. We are not required to be sure of the precise reasons for its exercise or be convinced of the wisdom of its exercise. It is enough if the legislation be passed in the exercise of a power of government and has relation to that power. *RAST v. VAN DEMAN & LEWIS CO.*, 240 U. S. 342, 365, 366, and cases cited; also *BUNTING v. OREGON*, 243 U. S. 426, 437.”

In the case of *PRUDENTIAL INSURANCE CO. v. CHEEK*, 259 U. S. 530, 42 S. Ct. 516:

“It is not for us to point out the grounds upon which the state legislature acted, or to indicate all the grounds that occur to us as being those upon which they may have acted. We have not attempted to do this; but merely to indicate sufficient grounds upon which they

reasonably might have acted and possibly did act to show that it is not demonstrated that they acted arbitrarily, and hence that there is no sufficient reason for holding that the statute deprives the corporation of its liberty or property without due process of law."

In the case of *INSURANCE CO. v. GLIDDEN CO.*, 284 U. S. 151, 158, 52 S. Ct. 69:

"The record and briefs present no facts disclosing the reasons for the enactment of the present legislation or the effects of its operation, but as it deals with a subject within the scope of the legislative power, the presumption of constitutionality is to be indulged. *O'GORMAN & YOUNG, INC., v. HARTFORD FIRE INS. CO.*, 282 U. S. 251; see *STANDARD OIL CO. v. MARYSVILLE*, 279 U. S. 582, 584; *OHIO EX REL. CLARKE v. DECKEBACH*, 274 U. S. 392, 397. We cannot assume that the Minnesota legislature did not have knowledge of conditions supporting its judgment, that the legislation was in the public interest, and it is enough that, when the statute is read in the light of circumstances generally known to attend the recovery of fire insurance losses, the possibility of a rational basis for the legislative judgment is not excluded.

"Without the aid of the presumption, we know that the arbitration clause has long been voluntarily inserted by insurers in fire policies, and we share in the common knowledge that the amount of loss is a fruitful and often the only subject of controversy between insured and insurer; that speedy determination of the policy liability such as may be secured by arbitration of this issue is a matter of wide concern, see *FIDELITY MUT. LIFE ASSN. v. METTLER*, 185 U. S. 308; *FARMERS' & MERCHANTS' INS. CO. v. DOBNEY*, 189 U. S. 301; that in the appraisal of the loss by arbitra-

tion, expert knowledge and prompt inspection of the damaged property may be availed of to an extent not ordinarily possible in the course of the more deliberate processes of a judicial proceeding. These considerations are sufficient to support the exercise of the legislative judgment in requiring a more summary method of determining the amount of the loss than that afforded by traditional forms."

An examination of the opinion of the Supreme Court of North Carolina. (228 N. C., 352, 45 S. E. (2d) 860) will show that Justice Seawell made a factual study and used such information and data as appellants now recommend to this Court.

The status of the closed shop in England and other nations was considered, and the situation in various trades and industries. The notes to the opinion show that Justice Seawell had before him the Report of the Committee (House of Representatives, 80th Congress, First Session, Report No. 245, accompanying H. R. 3020) upon which the Taft-Hartley Act was debated. The experience of other states was examined, and there was available the data presented by counsel for appellants which now appears as Exhibits Nos. 1, 2, R. 25, 40; No. 34. The case was considered by the Supreme Court of North Carolina according to the method selected and approved by appellants.

III

THE NORTH CAROLINA STATUTE HAS A REAL AND REASONABLE RELATION TO PUBLIC WELFARE, IN THAT IT PREVENTS MONOPOLIES AND TRADE UNION ABUSES DIRECTLY AND INDIRECTLY CAUSED BY THE CLOSED SHOP.

The General Assembly of North Carolina considered the problem of a trade union monopolizing the available labor power in an enterprise. Section 2 of the statute in question (Chapter 328, Session Laws of 1947) is as follows:

"Any agreement or combination between any employer and any labor union or labor organization whereby persons not members of such union or organization shall be denied the right to work for said employer or whereby such membership is made a condition of employment or continuation of employment by such employer, or whereby any such union or organization acquires an employment monopoly in any enterprise, is hereby declared to be against the public policy and an illegal combination or conspiracy in restraint of trade or commerce in the State of North Carolina."

North Carolina also has a general statute (Chapter 75 of General Statutes of North Carolina) on the subject of monopolies, trusts and combinations in restraint of trade. We quote the first two sections of the North Carolina Monopoly Act, as follows:

"§ 75-1. COMBINATIONS IN RESTRAINT OF TRADE ILLEGAL.—

Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the state of North Carolina is hereby declared to be illegal. Every person or corporation who shall make any such contract expressly or shall knowingly be a party thereto by implication, or who shall engage in any such combination or conspiracy, shall be guilty of a misdemeanor, and upon conviction thereof such person shall be fined or imprisoned, or both, in the discretion of the court, whether such person entered into such contract individually or as an agent repre-

senting a corporation, and such corporation shall be fined in the discretion of the court not less than one thousand dollars.

"§ 75-2. ANY RESTRAINT IN VIOLATION OF COMMON LAW INCLUDED.—Any act, contract, combination in the form of trust, or conspiracy in restraint of trade or commerce which violates the principles of the common law is hereby declared to be in violation of § 75-1."

The Supreme Court of North Carolina has not considered any case which attempted to apply the State Anti-Trust Law to trade unions and their activities prior to the statute now under consideration. There are cases giving constructions of the statute and pointing out the difference between common-law concepts of monopoly and the modern rule.

State v. Craft, 168 N. C. 208, 83 S. E. 772

State v. Coal Co., 210 N. C. 742, 188 S. E. 412

Bennett v. Southern Ry. Co., 211 N. C. 474, 191 S. E. 240

We do not intend to enter into a long discussion as to the nature of monopolies and combinations in restraints of trade as applied to trade unions and their practices. It is certain that the Federal Courts considered many activities and practices of trade unions within the Sherman Anti-Trust Act. We cite the primary cases, as follows:

Loewe v. Lawlor, 208 U. S. 274, 28 S. Ct. 301

Lawlor v. Loewe, 235 U. S. 522, 35 S. Ct. 170

Duplex Printing Co. v. Deering, 254 U. S. 443, 41 S. Ct.

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Amer. Steel Foundries v. Tri-City Council, 257 U. S.

184, 42 S. Ct. 72

Coronado Co. v. U. M. Workers, 268 U. S. 195, 45 S. Ct. 551

United States v. Brims, 272 U. S. 549, 47 S. Ct. 169

Bedford Co. v. Stone Cutters Ass'n., 274 U. S. 37, 47 S. Ct. 522

Local 167 v. United States, 291 U. S. 293, 54 S. Ct. 396

Apex Hosiery Co. v. Leader, 310 U. S. 469, 60 S. Ct. 982

United States v. Hutcheson, 312 U. S. 219, 61 S. Ct. 463

Allen Bradley Co. v. Local Union No. 3, 325 U. S. 797, 65 S. Ct. 1533

There is no doubt as to some of the state courts leaning toward the position that trade unions were engaged in many activities that promoted combinations in restraints of trade, and this was especially true of those states early in the field of anti-trust legislation. The cases cited below will illustrate our statement:

Curran v. Galen, 46 N. E. 297 (N.Y.)

Michaels v. Hillman, 183 N.Y.S. 77 (N.Y.)

Justin Seubert, Inc. v. Reiff, 98 Misc. 402, 164 N.Y.S. 522 (N.Y.)

Connors v. Connolly, 86 Atl. 600 (Conn.)

Berry v. Donovan, 74 N. E. 603 (Mass.)

Moore v. Behnett, 140 Ill. 69, 29 N. E. 888

Gatzow v. Beuning, 106 Wis. 1, 81 N. W. 1003

Irving v. Neal, 209 Fed. 471

Lehigh Structural S. Co. v. Atlantic S. & R. Co., 111 Atl. 376 (N.J.)

As illustrations of states emphasizing the anti-trust features of their statutes:

Campbell v. Motion Picture Machine Operators, 151

Minn. 220, 186 N. W. 781

Standard Engraving Co. v. Volz, 193 N.Y.S. 831 (N.Y.)

State v. Employers of Labor, 102 Neb. 768, 169 N. W.

717, 170 N. W. 185

The powers of the states to decide and enact into law those specific acts and conduct which shall constitute combinations in restraints of trade has long been established. Like other reserved powers, there must be a rational basis for the legislative decision; and under conceivable circumstances, there must be an actual relationship between the means and the end. Cases supporting an exercise of state power in regulating and prohibiting combinations that result in restraints of trade are as follows:

Waters-Pierce Oil Co. v. Texas (No. 1), 212 U.S. 86,
29 S. Ct. 220

National Cotton Oil Co. v. Texas, 197 U.S. 115, 25 S.
Ct. 379

Smiley v. Kansas, 196 U.S. 447, 454, 455, 25 S. Ct. 289

International Harvester Co. v. Missouri, 234 U.S. 199,
34 S. Ct. 859

Watson v. Buck, 313 U.S. 387, 61 S. Ct. 962

Central Lumber Co. v. South Dakota, 226 U.S. 157, 33
S. Ct. 66

Grenada Lumber Co. v. Mississippi, 217 U.S. 433, 30
S. Ct. 535

In *WATSON v. BUCK*, *supra*:

"In the consideration of this case, much confusion has been brought about by discussing the statutes as though the power of a state to prohibit or regulate

combinations in restraint of trade was identical with and went on further than the power exercised by Congress in the Sherman Act. Such an argument rests upon a mistaken premise. Nor is it within our province, in determining whether or not this phase of the state statute comes into collision with the Federal Constitution or laws passed pursuant thereto, to scrutinize the act in order to determine whether we believe it to be fair or unfair, conducive to good or evil for the people of Florida, or capable of protection or defeating the public interest of the state. These questions were for the legislature of Florida and it has decided them."

In CENTRAL LUMBER CO. v. SOUTH DAKOTA,
supra:

"If the legislature thought that that particular manifestation of ability usually came from great corporations whose power it deemed excessive and for that reason did more harm than good in their State, and that there was no other case of frequent occurrence where the same could be said, we cannot review their economics or their facts. That the law embodies a widespread conviction appears from the decisions in other States. STATE v. DRAYTON, 82 Nebraska, 254. STATE v. STANDARD OIL CO., 111 Minnesota, 85; 126 N.W. Rep. 527. STATE v. FAIRMONT CREAMERY, 153 Iowa, 702; 133 N. W. Rep. 895. STATE v. BRIDGEMAN & RUSSELL CO., 117 Minnesota, 186; 134 N. W. Rep. 496."

MONOPOLY AND RESTRAINT OF TRADE IS THE INEVITABLE RESULT
OF THE CLOSED SHOP

It is easy to see, from a casual reading of the brief, that appellants hope that this Court will weigh this case by the scale of conditions that existed as to trade unions in former

days. Just as a large group of business managers continue to think of capitalistic economy in terms of Ricardo's philosophy and laissez faire, so do the leaders of trade unions "warm their hands at the camp fires of the past," and attempt to put new wine in old bottles. Such concepts are based upon the idea that labor is always the so-called underdog. This concept is no longer applicable to the labor of today with its modern trade unions.

Professor Slichter of Harvard, in his book entitled "The Challenge of Industrial Relations," (Cornell University Press, 1947) comments on the power of trade unions today:

"Between 1933 and 1945 union membership in the United States increased fivefold, from about three million to about fifteen million. Unless unions make grievous blunders and lose confidence of the community (by interunion rivalry, for example), this growth will continue. A union membership of over twenty million within the next decade is a strong probability.

"The rise of unions constitutes an epoch-making change in the economy—quite comparable to such institutional changes as the rise of the modern credit system or of the corporation. Unions are no longer simple organizations which put workers in a moderately better bargaining position in dealing with employers. They are seats of great power—of the greatest private economic power in the community. Their policies from now on will be a major determinant of the prosperity of the country. If their policies are far-sighted, if unions see their stake in the prosperity of the community as a whole, unions will make a major contribution toward building a greater civilization in America. If unions are narrow, uninformed, and short-sighted in their policies, they will be as great a problem for the community as was the parochialism of the

towns and small principalities in the later Middle Ages. * * * *

"Today the United States has the largest, most powerful, and most aggressive labor movement which the world has ever seen. The 190-odd national unions recently had nearly 15 million members. Today, though the membership is smaller, they include nearly one-third of the 40 million employees outside agriculture and the professions. About 1.4 million members are professional or clerical workers. Two-thirds of the workers in manufacturing are covered by union agreements and about one-third in non-manufacturing industries outside of agriculture and the professions. In a number of non-manufacturing industries, such as coal mining, construction, railroading, and trucking, over four-fifths of the employees are under wage agreements. Retailing, wholesaling, and agriculture are the only important areas of employment in which the proportion of organized employees is low. The trade unions are the most powerful economic organizations in the community—in fact, they are the most powerful economic organizations which the community has ever seen. Their policies will be a major influence in determining how much the community produces, how rapidly it adds to its capital, and how the product of industry is divided."

In former times, the right of employees to combine and organize was recognized as beneficial and has been fostered by national and state legislation. There is no need to quote the national and state acts and the judicial interpretations of same. The exemptions from anti-trust acts have been commented upon. It was never contemplated that these domains of private power would convert this approval and these concessions into a monolithic organization maintained by the compulsive power of the closed shop. Certainly

it was never contemplated that the dissenter (non-union employee) should be coerced and crushed in a violent struggle for economic power. Instead of making trade unions attractive to the non-union man on a voluntary basis by democratic processes and the offer of concrete benefits, the simple technique of compulsory membership by the tyrannical power of the closed shop is more and more invoked. This leads, as if by natural law, to restraint of trade and monopoly. A few practical examples which are common knowledge:

(1) We now have, more and more, the spectacle of trade unions joining with employers in a community to dominate the sale and use of a commodity, destroy competition, establish artificial wage scales with no reference to production and establish total unionism by force. In such a plan of operation, the general welfare of the public is not considered.

Allen Bradley Co. v. Local Union No. 3, 325 U.S. 797,
65 S. Ct. 1533

Brescia Const. Co. v. Stone Masons' Contractors' Assoc.,
187 N.Y.S. 77 (N.Y.)

Overland Pub. Co. v. H. S. Crocker, Co., 193 Cal. 213,
210 P. 841

Campbell v. People, 72 Col. 213, 210 P. 841

A. T. Stearnes Lumber Co. v. Howlett, 260 Mass. 45,
157 N.E. 82

Purrington v. Hinchliff, 120 Ill. A. 523, 76 N.E. 47

Borderland Coal Corp. v. International Organization U.
M. W., 275 Fed. 871

It is not within the limits of space and time accorded to this brief to discuss the facts and details of these cases.

It does not, however, detract from our argument that in some instances, courts have held that unions were exempt from anti-trust laws because of exceptive provisions therein; but for these exemptions, the restraints would have been unlawful. Obviously, these conditions could not exist without the closed shop.

(2) Secondary boycott—"a combination not merely to refrain from dealing with complainant, or to advise or by peaceful means persuade complainant's customers to refrain ('primary boycott'), but to exercise coercive pressure upon such customers, actual or prospective in order to cause them to withhold or withdraw patronage from complainant through fear of loss or damage to themselves should they deal with it." (See: *DUPLEX PRINTING CO. v. DEERING*, 254 U.S. 443, 41 S. Ct. 177.)

Secondary Picketing—participants in the primary dispute picketing and using coercive measures against the primary employer's vendees, distributors, and extending to ultimate consumers in some cases.

Meadowmoor Dairies v. Drivers' Union, 371 Ill. 377, 21 N.E. (2d)

Evening Times Publishing Co. v. Am. Newspaper Guild, 122 N.J.Eq. 545, 199 A. 598

United Union Brewing Co. v. Dave Beck, 100 Wash. 412, 93 P. (2d) 772

Parker Paint & Wall Paper Co. v. Local Union, 87 W. Va. 631, 105 S. E. 911

The secondary strike—Based upon refusal to work with non-union employees, a refusal to process non-union goods, or to partially or completely process materials or commod-

ities going to non-union plants. (See Teller: Labor Disputes and Collective Bargaining, Vol. one, Chap. 7.)

(3) The makework system—examples as given by Thurman Arnold in Reader's Digest, Vol. 38, No. 230, June, 1941:

"One method is to force the employer to hire extra men for no good reason. The teamsters in New York decided that every truck entering the city must take on an unnecessary man who gets \$9 a day for doing no work. That's why it costs \$112 more to distribute a carload of vegetables through the Manhattan market than in neighboring regions free of labor exploitation. This idea was too good not to be imitated by unions all over the country. Electricians' unions in various cities insist that a full-time electrician be hired on any construction job using temporary power or light. Frequently he spends his day playing solitaire; his 'work' consists of pulling a switch one way when he arrives, the other way when he quits. Many operating engineers' unions will not allow a man to be hired for less than three days; if his employment exceeds that period he must be hired for a whole week.

"To milk dealers in New York who are willing to furnish milk at lower prices by keeping depots open only an hour and a half a day, the union says 'No.' Dealers must hire a full complement of labor full time, or shut up shop. Somebody in Dubuque had the bright idea that the delivery cost of two or three quarts of milk was the same as one. Therefore he offered a lower price to consumers who took more milk for their children. Here also the union said 'No.' In Chicago milk was being sold at lower cost to consumers willing to buy it at stores. The milk wagon drivers stepped in, and the more expensive system of bottle delivery was forced on low-income groups.

"By making alliances with each other, such unions extend their power to exploit consumers. Students at the University of Chicago formed a cooperative club. They bought milk cheaply from a farmers' cooperative. The milk wagon drivers told them to stop. The students insisted that in a free country they could buy where they pleased. So they had to be taught a lesson. First the union cut off their food deliveries. The students carried their own food. Then the union cut off their garbage service. The students capitulated.

"These 'middleman' unions likewise stop improvements in materials and methods. Look at what the Hod Carriers' Union is doing in Chicago. To mix concrete mechanically at a central plant and carry it to the job in trucks with revolving mixers improves quality and cuts down building costs—and subsequent rentals. But the Chicago hod carriers refused to allow use of truck mixers.

"In Belleville, Ill., unions have been indicted with dealers and contractors for preventing the building of houses with prefabricated structural parts. In Houston, Texas, plumbers insisted that pipe made for particular jobs would not be installed unless the thread were cut off and a new thread made on the job. In Chicago, sash, frames and screens must be primed, painted and glazed on the job. Plumbers and electricians in other places insist that pipe cutting and wiring must be done on the job—more expensively than at the factory. Painters' unions in many districts will not permit the use of spray guns; brushes make more work. Similarly, in Washington, D. C., machinery must not be used to cut wire or thread pipe.

"It costs \$1000 more to build a six-room house in Cleveland than in Detroit. Why? One reason is that contractors who use prefabricated materials or economical methods are afraid to do business in Cleveland.

"Incidentally, nobody gets that extra \$1000. Houses simply aren't built. In 1939, FHA loans for houses in Detroit totaled \$59,000,000; in Cleveland, only \$21,000,000. Not even organized labor profits. Cleveland carpenters made more by the hour; but Detroit carpenters had more work and larger annual incomes. "Where high costs restrict building, the housing shortage gets more acute and labor has to pay higher rents out of less income.

"Many unions resort to the device of erecting local embargoes. In Chicago, a building trades council will not allow the use of stone which has been cut in Indiana. It must be brought in rough, which increases freight costs 20 percent; it must be cut in Chicago, though the quarries are more efficiently equipped to do the work. In Pittsburgh and San Francisco, carpenters' unions prohibit the use of millwork made out of town. New York metal lathers will not touch lath fabricated outside the city. All this flimflam, which is spreading all over the country, might be funny if it were not so expensive to people with low incomes who have to cut down on food in order to pay higher rents.

"Another threat of the holdup unions is to business competition and to the existence of small independent business concerns. In Washington, the teamsters threatened to strike to compel certain stores to increase the price of bread, the whole maneuver pleasing other retail stores that did not like the competition of a larger loaf for the standard price.

"Think of the owner of a little clothing store in Washington who had his shop painted by a CIO union. He then was picketed to compel him to have his shop repainted by the AFL union. He couldn't afford that expense.

"In Detroit three wholesale paper dealers are told by the teamsters' union to go out of business. There is nothing they can do about it. They are not allowed to hire union men; they cannot get their paper hauled. The union has made a deal with some employers to eliminate competitors. Likewise, 65 independent truckers in Pittsburgh are being forced out of business in spite of the fact that they are willing to hire union labor.

"Then there is the exploitation of labor by labor. At Fort Meade the Steamfitters' Union admitted only six new members during the peak of construction; thus the favored few on the inside were able to work overtime at double pay, earning \$150 a week. The electricians, instead of admitting new members, levied a daily fee of \$1 or \$2 per man for a working permit. The carpenters went to the other extreme, taking into the union a mass of untrained and incompetent men bound to be discharged soon after paying their admission fees. The New York Times reports that the union 'take' from this source was over \$400,000.

"Some unions have such high admission fees that it is almost impossible for the average man, no matter how well qualified, to join. The truckers in Seattle, for instance, charge \$500. The Motion Picture Union in Cleveland grabs \$1000. And the Glaziers' Union in Chicago demands a cool \$1500 for the right to work.

"Does labor want the sort of thing I have been describing? I do not believe it. I can find no evidence that such impositions are thought up by the rank and file. Unfortunately, the rank and file often have little control over union affairs. In Chicago's Hod Carriers' Union, for example, there has been no election for 29 years. Joseph V. Moreschi, head of the union, has a large income from the dues he collects from common

labor. Why should he submit that income to the hazards of an election?

"When individuals do protest, unscrupulous leaders have ways of punishing them. Here's one example. Two men—let's call them Smith and Black—dropped into the Department of Justice the other day. They had been members of a union in Chicago. Dissatisfied with the management, they had made a protest. The management took away their union cards. This was a catastrophe because the union's old-age benefit fund made a membership worth about \$5000. Smith and Black went into court and got an injunction. The union fought the injunction, and during the ensuing litigation Smith and Black went broke. So they gave up their retirement funds and moved to Washington, where, being good workmen, they soon got jobs. As soon as they were established the Chicago union found out about it and told the Washington employer to fire them. He had to comply.

"Smith and Black are about 50 years old. They are skilled in their trade. But they can't work at that trade any longer. They are stunned and beaten men. It doesn't take many such examples to prove to the workman that he had better not protest too much against the actions of the union management."

Opinion of Eric Johnston, Reader's Digest, Vol. 44, No. 264, April, 1944:

"Arbitrary refusal to accept workers into membership. When a union has a closed-shop contract, a refusal of membership means that the worker is deprived of his livelihood. This is accomplished by restricting new men to temporary 'work permits,' or by putting the initiation fee so high the worker cannot pay it. All such maneuvers are designed to create a monopoly of

jobs for union members. How popular do you think the idea of monopoly is with the American people?"

Mr. Arnold's further examples of makework or feather-bedding, Reader's Digest, Vol. 44, No. 261, January, 1944:

"But those friends have been obsessed with the theory that if labor leaders and farmers and consumers and businessmen will only sit down and discuss their problems, indefensible exploitation of labor power will cease without the necessity of limiting the abuse of that power by law. Such a result was not observable when the plumbers sat down with the manufacturers and prevented home builders from getting cheap fixtures. It did not happen when John L. Lewis struck against the Government's emergency anti-inflation policy.

"Nor did it happen when Mr. Petrillo, head of the musicians' union, conferred with the government conciliator who was trying to protect record manufacturers who were being driven out of business and small independent radio stations which were compelled to hire unnecessary labor they could not afford. Instead, Mr. Petrillo said he would stop commercial programs by those who did not pay tribute to his union. As to 'canned music,' he was quoted in the New York Times as asserting: 'We're not going to make any transcriptions at any price, because the companies haven't anything we want. If the transcription companies gave us their entire gross income it's still small peanuts to the musicians' federation.'

"Thus it appears that the freedom to produce an article which a labor union doesn't like is gone from our list of freedoms. Mr. Petrillo is only a picturesque example of a wide variety of coercive exploitation of consumers and businessmen and workers themselves,

for purposes which no one in his right mind would consider legitimate labor objectives.

"It is beside the point to say that history shows labor more sinned against than sinning. When the development of mass production in housing is made impossible in cities where labor unions will not tolerate improved methods of building, when farmers cannot grade their own eggs and ship them to market because of the arbitrary fiat of a union, when a union prevents the sale of cheaper bread, when independent businessmen are ruthlessly destroyed by a struggle for domination between two unions, when workmen are charged for the right to work, when stories of union racketeering are published everywhere, it is no use pointing out the sins of other groups as an excuse.

"Of course, only a few unions strategically located are abusing their power; but unfortunately these dominate the production and distribution of some of the necessities of life. For example, the Milk Drivers Union in New York would not conform to an order of the Office of Defense Transportation curtailing deliveries to save gasoline. The union said that the order would cause the loss of two to three thousand jobs. The Mayor of New York pointed out that men were scarce and that 2000 jobs were open in the police and fire departments. Such strikes will continue so long as unions are permitted by law to preserve useless jobs at the expense of business and the consuming public.

"What is the reason for the restrictive policies to which labor unions have become committed? A certain percentage is graft and corruption, but a larger percentage is the result of the age-old struggle for economic power by men who love power. Whenever a small group of individuals, uncurbed by legal authority, is permitted to dominate any important part of the pro-

duction or distribution of the necessities of life, these results will inevitably follow:

"They seek to consolidate their power by destroying existing independent enterprise.

"They prevent new enterprise from entering the field.

"They restrict production and raise prices.

"They stop the introduction of more efficient methods of production in order to maintain obsolete ways in which they have a vested interest.

"They set up an arbitrary and despotic control over the industry and exploit members of their own group.

"They enter into politics, using money and economic coercion to maintain themselves in power."

(4) The Closed Union—This represents the most glaring example of the natural development of the closed shop. It is usually accomplished by admission practices. Slichter; "The Challenge of Industrial Relations":

"Admission requirements. In general, unions admit any properly-qualified worker without regard to creed, politics, or race and without imposing onerous economic restrictions. And yet restrictions are far from rare. The wire weavers admit only Christians and the railway carmen and the masters, mates, and pilots require belief in a Supreme Being. A substantial number of unions bar Communists and others deny Communists the right to hold office. The United Mine Workers is one of the unions barring membership to Communists. The carpenters' union is another. The A. F. of L. at its 1939 convention advised its constituent unions to exclude Communists. A number of

unions still exclude women. Discrimination against Negroes is the most important restriction on union membership. About twenty national unions exclude Negroes either by their constitutions or by their rituals. Many local unions exclude Negroes where the nationals do not. Some unions discriminate against Negroes by putting them in separate locals or by limiting their right to hold office.

"A few unions require candidates for admission to serve onerous apprenticeships, but in most cases the terms of apprenticeship are reasonable and experience at the trade is counted as equivalent to apprenticeship. The variation in admission fees is wide. Some nationals limit the fees which their locals may charge. The Amalgamated Clothing Workers puts the limit at \$10, the bricklayers at \$100, and the lathers at \$100. Initiation fees of \$200 or more, however, are far from rare, especially in the building trades. The glaziers in Cincinnati charge \$400 and in Chicago \$1,500. Some locals of the motion picture operators charge \$500 to \$600. A large local of the teamsters' union in New England, against the advice of its officers, put the initiation fee at \$250. Soon the rank and file began to ask that their friends and relatives be taken in for less. As a result, the high fee was repealed. Most restrictive of all is the refusal of a local union to admit anyone. Sometimes the rule is that no one will be admitted while members are out of work. The influence of the national officers of unions is almost invariably against the refusal of locals to accept members. The national officers know that this refusal in the long run will weaken the union by forcing a larger and larger proportion of the workers in the occupation or industry into non-union shops."

In Reader's Digest, Vol. 44, No. 264, April, 1944, Eric Johnston comments on this practice:

"Restraints on production. From the economic point of view, this one is the worst.

"As developed by some unions, these restraints are called 'feather-bedding' and 'slow-downing.' More men than are needed for the job. Each man doing less than he could do. Waste of manpower. Waste of human resources. It is a grievous wrong to the whole American economic system.

"There are two comments to be made on it.

"In the first place, some enlightened unions have turned against this kind of thing and are earnestly helping their employers to increase output. They realize that if the workers are to have the good things of life, those things must be *produced* and produced *more abundantly*.

"In the second place, some employers are themselves to blame. For what is the basic cause of 'feather-bedding' and of 'slow-downing' by workers? It is this: The workers say to themselves, 'Listen!. As soon as this job is finished, we're going to get laid off and thrown into the street. So let's go slow and make the job last.'

"Gentlemen of management, *you* don't get laid off. You're part of what we call the 'overhead' of a business. The 'overhead' has to go on, even between jobs, in order to hold the business together. But doesn't it occur to you that the worker also has an 'overhead'? He has to keep on paying the landlord and the grocer and the butcher. His costs don't stop just because he is laid off.

"We have to have more job security in America. We must strive to give our workers continuous employment. Where that's impossible, we must develop a

sane, sensible program for more adequate unemployment insurance which will take care of the worker's 'overhead' during his times of being laid off.

"Then the unions must do their part. They must abolish rules that hold a man down to doing half a man's work. You can't build a strong America on half-men."

This same problem is also discussed in the following articles:

Donald R. Richberg, Reader's Digest, Vol. 50, No. 299, March, 1947.

Ralph A. Newman; Membership Requirements in Closed Union, Where There is a Closed Shop; 43 Col. Law Review 42.

Arbitrary Action over Union Members in Closed Shop; Example of: Senate Report No. 105, P. 6.

See also example of punishment inflicted on union members; Thurman Arnold, Reader's Digest, Vol. 38, No. 240, June, 1941, p. 139; Editorial by David Lawrence, Reader's Digest, Vol. 50, No. 298, p. 18; House Report 245, 80th Congress; 1st Sess. Senate Report, 105, 80th Congress, 1st Sess.

(5) Strikes called for compulsory union membership purposes:

On this subject, we could cite many cases and articles. We cite only a few:

Apex Hosiery Co. v. Leader, 310 U. S. 409, 60 S. Ct. 987

Hunt v. Crumboch, 325 U. S. 821, 65 S. Ct. 1545

Allen Bradley Co. v. Local Union No. 3, 325 U. S. 797,

65 S. Ct. 1533

There are also many cases decided by the Supreme Court of the various states on this subject. We here ask the Court to consider the reasons advanced by appellee under Part I of its Brief. However, in connection with this subject, we quote from an article written by T. T. Hammond, 21 N. C. L. Rev. 127, under the direction of Dr. Harry D. Wolf, Professor of Labor Law, University of North Carolina, and Judge J. Warren Madden, former Chairman of the National Labor Relations Board. The quotation follows:

"ARGUMENTS AGAINST THE ALL-UNION SHOP:

"Numerous arguments against the all-union shop can be found in magazines and newspapers, and in the numerous pamphlets distributed by the National Association of Manufacturers and other employer associations. The usual arguments can be summarized as follows: (The term 'closed shop' is always used in these arguments.)

"1. The closed shop is a denial of one of the fundamental rights of man, the right to work. It forces a worker to join a private organization against his will in order to exercise his individual right to earn a living.

"2. The closed shop is undemocratic because it does not protect minority rights. It is one thing for the minority to abide by the will of the majority in an organization to which they both *voluntarily* belong, but it is quite another thing for the majority to compel the minority to become a part of it.

"3. The closed shop represses initiative, eliminates the incentive to excel, and tends to force all workers into a mold of mediocrity. Further extension of the closed shop will result in an America of fixed classes

by making it impossible for the ambitious workers to forge ahead.

"4. The closed shop hinders productive efficiency. The primary concern of union leaders is not to increase production but rather to keep the greatest number of dues-paying members employed at the highest possible wages. To do this they have resorted to 'spread the work' and other restrictive measures. Thus, costs are increased and the consumer is made to suffer.

"5. The closed shop prevents efficient selection of workers. Workers are hired and promoted not according to their ability but according to their loyalty to union policies and their blind adherence to the dictates of union officers.

"6. The closed shop makes efficient management impossible. It gives union leaders veto power over management, although the union has no responsibility for the success of the business.

"7. The closed shop is used to enforce a monopoly of the labor supply. Membership in the unions is restricted by unreasonable initiation fees or by arbitrary refusal to take in new members. Thus a small group of union members profit while the rest are unable to find jobs.

"8. The closed shop vests dictatorial powers in union leaders. The union member is denied the right to protest against union policies by resigning. The closed shop is closed against effective protests from the very membership which supports it. Union officers who are made invulnerable by a closed shop forget the needs of the members while feathering their own nests.

"9. The closed shop places in the hands of the union powers of compulsion which rightly belong only to the state. It is no more just to require all workers to join the union and pay dues than it is to require every beneficiary of Christian civilization to join the church and pay the tithe.

"10. If unions have done as much to improve the condition of the worker as they claim, then it is surprising that all workers do not voluntarily flock into the union fold. Unions should be willing to win membership through proving their worth to the individual instead of depending upon the compulsion of the closed shop.

* * * * *

"12. Unions in England and Scandinavia and the railroad brotherhoods in America have gained large membership through proving their worth and responsibility, and without resorting to the compulsion of the closed shop. Other unions should follow their example.

* * * * *

"18. The presence of the closed shop after the war will prevent returning soldiers and sailors from obtaining employment. It will aggravate post-war economic conditions by making it difficult to start new industries, to reach new markets, to sell at fair prices, and to compete in world markets.

"19. The closed shop is often unpopular with the union members themselves. Union leaders in many cases have demanded that an employer sign a closed shop contract when the rank and file knew nothing about it and had not authorized the leaders to sign such a contract. Even when the leaders have been able to persuade their members to favor a closed shop or maintenance of membership contract, the members soon tire of being compelled to retain their member-

ship and would like to resign if they could do so without losing their jobs.

* * * * *

"21. Union leaders are free to manipulate vast sums of money collected from unwilling as well as willing workers with no legal requirement to account for receipts and expenditures. Dangerous political influence is wielded through their power to make campaign contributions as they please, without the consent of the membership."

The primary object of the North Carolina right-to-work statute is to guarantee to the individual worker in North Carolina that his right to work for a living in the common occupation of the community will be protected from both labor union officials and employers who would deprive him of that right either because he is, or is not, a member of a labor union. The closed shop denies that right unless the worker submits to the absolute control of a private organization—the labor union—over the terms and conditions of his employment. He must also submit to the control of that private organization as to whether he shall remain employed, or whether he shall go on strike and be unemployed in order to execute union policy over which he has no individual control. Certainly, such an institution is a violation of what "the common-law has long recognized as part of the boasted liberty of citizens", viz: "The right of every man to freely engage in such lawful business or occupation as he himself may choose, free from hindrance or obstruction by his fellow men, saving such as may result from the exercise of equal or superior rights on their part."

BRENNAN v. UNITED HATTERS, 73 N. J. Law 729, 742, 65 Atl. 165; CONNORS v. CONNOLLY (Conn.), 86 Atl. 600, 604.

It has long been settled by this Court that the right of individual human beings to work unmolested and unfettered, is a right which is protected by the Fourteenth Amendment to the Constitution. In *ALLGEYER v. STATE OF LOUISIANA*, 165 U. S. 578, 17 S. Ct. 427, decided in 1896, Mr. Justice Peckham said:

"The liberty mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."

That the inalienable right to work for a living—to follow any of the ordinary callings of life—is a right which is protected by the Fourteenth Amendment has been reaffirmed many times since the *ALLGEYER* case. Consider this Court's utterances in *MEYER v. NEBRASKA*, 262 U. S. 390, 43 S. Ct. 625; *BUTCHERS' UNION COMPANY v. CRESCENT CITY COMPANY*, 111 U. S. 746, 4 S. Ct. 652; *COPPAGE v. KANSAS*, 236 U. S. 1, 35 S. Ct. 240, 248; *TRUAX v. RAICH*, 239 U. S. 33, 36 S. Ct. 7; *NEW STATE ICE COMPANY v. LIEBMANN*, 285 U. S. 262, 52 S. Ct. 371; *BARBIER v. CONNOLLY*, 113 U. S. 27, 5 S. Ct. 357; *YICK WO v. HOPKINS*, 118 U. S. 356, 6 S. Ct. 1064.

In *MEYER v. NEBRASKA*, *supra*, at 399.

"While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not mere freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

In BUTCHERS' UNION CO. v. CRESCENT CITY CO., *supra*, at 762:

"The right to follow any of the common occupations of life is an inalienable right; it was formulated as such under the phrase "pursuit of happiness" in the declaration of independence, which commenced with the fundamental proposition that "all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness." . . . I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States."

In COPPAGE v. KANSAS, *supra*, at 14:

"Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty

in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money.' "

In *TRUAX v. RAICH*, *supra*, at 41:

"It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure.' "

In *NEW-STATE ICE CO. v. LIEBMANN*, *supra*, at 278:

"Under that amendment, nothing is more clearly settled than that it is beyond the power of a state, 'under the guise of protecting the public, arbitrarily (to) interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.' "

In *BARBIER v. CONNOLLY*, *supra*, at 31:

"The fourteenth amendment . . . undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness, and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, and the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one, except as applied to the

same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition.”

In *YICK WO v. HOPKINS*, *supra*, at 370:

“For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.”

That the right to work is one of the essential freedoms of man without which citizenship would be but an empty name, and that the closed shop is a gross infringement of that right within the meaning of this Court in the foregoing quotations, has been recognized in many quarters. Consider these illustrations of abuse in regard to union-membership requirements where the closed union and the closed shop exist:

“On January 14th, 1942, President Roosevelt transmitted to Congress a report submitted to him by the National Resources and Planning Board. The president’s letter of transmittal referred to the report as outlining ‘some of our major objectives in planning to win the peace.’ The report, amplifying the Roosevelt-Churchill Atlantic Charter, recited nine freedoms, mentioning first ‘The right to work, usefully and creatively through the productive years.’

“The enjoyment of this right can hardly be secured unless, among other changes in our social and economic structure, some control be effected over membership requirements of labor unions. The initiation fee

of apprentices in a New Jersey union was increased over a short period of time from five hundred dollars to three thousand dollars. Union rules setting forth grounds of expulsion have included the commission of any 'disreputable' act or any act bringing 'reproach' or 'discredit' on the union; conduct unbecoming a union member; drunkenness; 'wrongfully' condemning any decision rendered by any officer of the organization; a member's deserting his family 'without good cause,' and using an unapproved circular. Least dramatic but most final of all grounds of expulsion, because less open to disputes of fact, is that of non-payment of dues. It has been held that the decision of the executive board of the union as to the breach of the rules is final, even though it was erroneous in fact."

THE CLOSED UNION AND THE RIGHT TO WORK
by Ralph Newman.

Consider also the report of the Senate Committee on Labor and Public Welfare after holding hearings on the closed shop prohibitions of the Federal Labor Management Relations Act of 1947:

"Until the beginning of the war only a relatively small minority of employees (less than 20%) were affected by contracts containing any compulsory features. According to the Secretary of Labor, however, within the last 5 years over 75 percent now contain some form of compulsion. But with this trend, abuses of compulsory membership have become so numerous there has been great public feeling against such arrangements. . . . We have felt that on the record before us the abuses of the (closed shop) system have become too serious and numerous to justify permitting present law to remain unchanged. *It is clear that the closed shop which requires preexisting union membership as a condition of obtaining employment creates too great a barrier to free employment to be*

longer tolerated. In the maritime industry and to a large extent in the construction industry union hiring halls now provide the only method of securing employment. This not only permits unions holding such monopolies over jobs to exact excessive fees but it deprives management of any real choice of the men it hires. Extension of this principle to licensed deck and engine officers has created the greatest problems in connection with the safety of American vessels at sea. (See testimony of Almon E. Roth, id., vol. 2, p. 612.)

"Numerous examples were presented to the committee of the way union leaders have used closed-shop devices as a method of depriving employees of their jobs, and in some cases a means of securing a livelihood in their trade or calling, for purely capricious reasons. In one instance a union member was subpoenaed to appear in court, having witnessed an assault upon his foreman by a fellow employee. Because he told the truth upon the witness stand, the union leadership brought about his expulsion with a consequent loss of his job since his employer was subject to a closed-shop contract. (See testimony of William L. McGrath, id., vol. 4, p. 1982.)

"Numerous examples of equally glaring disregard for the rights of minority members of unions are contained in the exhibits received in evidence by the committee. (See testimony of Cecil B. DeMille, id., vol. 2, p. 797; see also, id., vol. 4, pp. 2063-2071). If trade-unions were purely fraternal or social organizations, such instances would not be a matter of congressional concern, but since membership in such organizations in many trades or callings is essential to earning a living, Congress cannot ignore the existence of such power." (Emphasis supplied). SENATE REPORT NO. 105, 80th Congress, First Session, pp. 6 and 7.

The Congress of the United States then went on to prohibit the narrowly defined closed shop and to permit a union shop only when subject to certain conditions laid down in the Labor Management Relations Act (Section 7 and Section 8, subsection 3). At the same time, the Congress made it clear that "the bill does nothing to facilitate closed shop agreements or to make them legal in any State where they may be illegal." SENATE REPORT NO. 105, 80th Congress, First Session, p. 6; FEDERAL LABOR MANAGEMENT RELATIONS ACT of 1947, Section 13, subsection (b). North Carolina, in enacting its right-to-work legislation, was but utilizing the power left it by the Congress to protect those individual rights already sanctioned by this Court. The purpose of the North Carolina law is concisely declared in the caption of the act, where it is said:

"AN ACT TO PROTECT THE RIGHT TO WORK AND TO DECLARE THE PUBLIC POLICY OF NORTH CAROLINA WITH RESPECT TO MEMBERSHIP OR NON-MEMBERSHIP IN LABOR ORGANIZATIONS AS AFFECTING THE RIGHT TO WORK . . ."

And again in Section 1 of the Act, where it is stated:

"The right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraints and coercion. It is hereby declared to be the public policy of North Carolina that the right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization." (Emphasis supplied.)

The record in this case (No. 34) shows by the evidence that the Building and Construction Trades Council of Asheville undoubtedly had control over the construction business in that community, and certainly they had control over the construction business of the employer (Whitaker) who signed the agreement, whichever way the word "enterprise", as used in the statute, may be interpreted. In other words, this Building Council had a monopoly over labor power for construction purposes. We are aware of the fact that one of the witnesses testified that no labor organization within the State possessed any monopoly in the supply of labor in any city, county or area of the State by reason of any union security agreement, but this was a mere conclusion of the witness. The verdict of the jury has established and foreclosed any inquiry into the facts as this Court does not pass upon the weight of the evidence. The State had a right to declare what acts should or should not constitute a crime.

THE ARGUMENT OF REGULATION OF TRADE UNIONS INSTEAD OF THE PROHIBITION OF THE CLOSED SHOP

The General Assembly, in enacting the "Right-to-Work" Act, treated the denial of a person to work, because of membership or non-membership in a labor union, as an *abuse* contrary to the public interest. It reached the legislative conclusion that denying a person the right to work because of membership or non-membership in a union was unfair and against the public interest. It was the legislative conclusion that the closed or union shop was the *abuse* itself. Obviously an *abuse* cannot be destroyed by preserving it. The law enacted was dealing with the right of men to work. No man anywhere has been prohibited from work-

ing; and, on the contrary, the purpose of the Act is to open the doors of employment so that instead of confinement of the right to work, it is made available to all.

Congress, in enacting the Taft-Hartley Bill, placed a complete prohibition on the closed shop—as it had a right to do. It permitted the union shop only on certain defined conditions. It could have likewise absolutely prohibited the union shop rather than permitting it under the control of provisions designed to curtail the evil practices which had become so much associated with it.

The union security provisions of employment contracts are for the main purpose of keeping other people from getting jobs with the employer. Leaving this provision out does not in any manner keep the members of a union from securing jobs with an employer and continuing to work for the employer so long as it is mutually satisfactory to do so.

The question involved is not in any sense preventing a person who works to make a contract for his employment, but it prevents the contract being made for his employment *which keeps some other person from having a right to work for the employer.*

Thus, the closed shop or union shop which is prohibited by the North Carolina statute does have a wide public interest in this State by permitting 92%, or more, of the industrial workers of this State who are not under closed shop a better opportunity for a job and preventing monopoly in favor of the members of a union which secures the union security contract.

The appellants' entire argument sums up to an admission that the State has a right to regulate but not to prohibit a practice which is found to be contrary to the public interest. *An abuse does not have to be regulated. An abuse*

can be cut out by the roots and destroyed at its source, as has been held in many cases of a similar character dealing with employer-employee relations.

The Railway Labor Act, hereinbefore referred to, did not attempt to regulate the use of the closed shop contract with railway employees and employers, but provided an absolute prohibition of this practice; and this Act has been held to be in all respects constitutional. *SHIELDS v. UTAH IDAHO CENT. R. CO.*, Utah 1938, 59 S. Ct. 160, 305 U. S. 177, 83 L. ed. 111; *VIRGINIA RY. CO. v. SYSTEM FEDERATION NO. 40*, Va. 1937, 57 S. Ct. 592, 300 U. S. 515, 81 L. ed. 789. See other cases cited, Note 1 to Title 45, Section 151, U.S.C.A.

According to the appellants' theory, this type of legislation would have been unconstitutional in providing an absolute prohibition against the union or closed shop.

Likewise, in numerous other cases, the Supreme Court of the United States has upheld as constitutional direct prohibitions against abuses affecting the public interest in labor relations. This Court has sustained laws prohibiting employment in excess of eight hours a day in underground mines and smelters; requiring redemption in cash of store orders issued in payment of wages; forbidding the payment of seamen's wages in advance; making it unlawful to contract to pay miners employed at quantity rates upon the basis of screened coal instead of the weight of the coal as originally produced in the mines; prohibiting contracts limiting liability for injuries to employees; limiting the hours of work for employees in manufacturing establishments; prohibiting the blacklisting of employees; prohibiting the intimidation of employees, and many other similar enactments, as shown in cases already cited in this brief.

In addition to these instances in which prohibitory

legislation has been upheld as distinguished from legislation regulating "evils" or "abuses", in the following cases, direct prohibitions instead of regulations were upheld when enacted by State laws under its police power:

1. Manufacture and sale of oleomargarine. *POWELL v. PA.*, 127 U. S. 678, 8 S. Ct. 992, 12 L. ed. 447.
2. Selling cigarettes. *AUSTIN v. TENN.*, 179 U. S. 343, 21 S. Ct. 132.
3. Selling stocks on margin. *OTIS v. PARKER*, 187 U. S. 606, 23 S. Ct. 168.
4. Keeping billiard halls. *MURPHY v. CALIF.*, 225 U. S. 623, 32 S. Ct. 697.
5. Selling trading stamps. *RAST v. VAN DEMAN & LEWIS CO.*, 240 U. S. 342, 36 S. Ct. 370.

In connection with these cases, Justice Brandeis, in his dissenting opinion in *ADAMS v. TANNER*, 244 U. S. 590, 37 S. Ct. 662, cited by appellants, states that these cases show that the scope of the police power is not limited to regulation as distinguished from prohibition, and that they show that the power of the State exists equally whether the end sought to be attained is the promotion of health, safety or morals, or is the prevention of fraud and the prevention of general demoralization, and quotes as follows:

"If the state thinks that an admitted evil cannot be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts cannot interfere unless in looking at the matter they can see that it is an equally unmistakable in-

fringement of the rights secured by fundamental law." Citing OTIS v. PARKER, 186 U. S. 606; BOOTH v. ILLINOIS, 184 U. S. 425.

The dissenting opinion of Justice Brandeis in ADAMS v. TANNER was joined in by Justices McKenna, Holmes and Clark and represents the prevailing opinion of the present Supreme Court.

In none of these cases was the legislation framed to attempt to correct these abuses by providing conditions under which they could continue, as is here suggested, but the abuses themselves were cut out by the roots by direct prohibitions.

Had the Legislature attempted to prohibit the making of contracts of employment between employers and employees, the argument which the appellants advance would have some application. That is the fundamental right of a person—to employ and to be employed. The varying conditions of employment and types of contract which might be made which would restrict the right of others to be employed and affected with a vital public interest, are subject to the police power of the State.

No case which is cited by the appellants in any way contradicts the position above set out.

TREIGLE v. ACME HOMESTEAD ASSOC., 297 U. S. 189, 56 S. Ct. 408, held unconstitutional a state statute which prevented a stockholder in a building and loan association, in violation of his contract, from withdrawing his shares of stock as provided in the contract. This case was decided under the contract provisions of the Federal Constitution with no relationship whatever to the question here discussed.

The case of HOUSE v. MAYS, 219 U. S. 270, 31 S. Ct.

234, cited by appellants, upheld the validity of a Missouri statute which prohibited arbitrary deductions from actual weight or measure under customs of rules of boards of trade. This statute did not attempt to regulate this evil or abuse but absolutely prohibited it.

In *BOOTH v. ILLINOIS*, 184 U. S. 425, 22 S. Ct. 425, an Illinois statute which prohibited all dealings in futures in the selling of grain was held constitutional under the police power of the State. The Illinois Act did not attempt to regulate dealings in futures in grain but provided an absolute prohibition.

In *MUGLER v. KANSAS*, 123 U. S. 623, 8 S. Ct. 273, the constitutionality of a statute enacted by Kansas absolutely prohibiting the manufacture and sale of spirituous liquors was sustained as constitutional under the police power of the State.

The Railway Labor Act, Title 45, U.S.C.A., in Section 152 (fourth), prohibits the check-off by carriers. This statute provides as follows:

"No carrier * * shall * * deduct from wages of the employees dues, fees, assessments, or other contributions payable to labor organizations, or * * collect or * * assist in the collection of any such dues, fees, assessments or other contributions."

This provision was attacked and its constitutionality upheld in the case of *BROTHERHOOD OF R. R. SHOP CRAFTS v. LOWDEN*, 86 Fed. (2d) 458, 10 A.L.R. 1128 (10th C. C. A.).

Certiorari in this case was denied, 300 U. S. 659, 81 L. ed. 863.

In enacting Chapter 328 of the Session Laws of 1947, the General Assembly of North Carolina had to consider grave

problems of national concern which had arisen in connection with the labor movement in the United States, which problems were by no means nonexistent in this State which in recent years has grown to be an industrialized community. According to the Bureau of Census figures, the value of manufactured products in North Carolina in 1945 amounted to \$2,361,756,000, this figure not including the value of mineral or agricultural products. According to the estimates of the North Carolina Department of Labor, there were employed in manufacturing industries in North Carolina in May, 1947, 366,000 persons, and in nonagricultural pursuits, 728,000.

These figures clearly demonstrate that North Carolina, as an industrial State, had to solve the labor problem and was confronted with it here as well in other jurisdictions. The wave of strikes which swept the United States just prior to the enactment of the 1947 Act were felt in North Carolina, although not as seriously as in other places. The consumers of coal in North Carolina felt the effect of the strike, one phase of which was dealt with by this Court as recited in the contempt proceedings in the case of UNITED STATES v. JOHN L. LEWIS and the UNITED MINE WORKERS OF AMERICA, 330 U. S. 258, 67 S. Ct. 677, in the same manner that the conditions therein referred to were felt in other States, and this aroused the same degree of public resentment here as elsewhere.

There can be little doubt but that the epidemic of labor strikes in American essential national industries in the war period aroused public opinion in North Carolina and made its contribution to the enactment of the North Carolina Act.

The following quotation is of interest:

"On November 20, 1941, less than a month before Pearl Harbor, American defense production was threatened with chaos. Approximately 150,000 members of the United Mine Workers Union were out on strike. Interruptions in the mining of coal during September, October and November had so curtailed the coal supply that defense plants in many parts of the country were threatened with the possibility of having to quit work on government orders. The National Defense Mediation Board, whose job it was to keep defense disputes at a minimum, had been unable to settle the miners' strike and had fallen to pieces as a result of the struggle.

"This dangerous interruption in the preparation of America for War had been caused by a dispute over a single issue—union security. This was the same issue which had halted construction of warships at the Federal Shipbuilding and Drydock Company, had caused a prolonged strike at Allis-Chalmers Manufacturing Company, almost broke up the President's Industry-Labor Conference, resulted in Government confiscation of the S. A. Woods Machine Company, and threatened to destroy the War Labor Board just as it had destroyed the National Defense Mediation Board. Under both boards the issue which aroused most public controversy and which gave government mediators the most headaches was the question of whether or not unions should be given security by granting them the all-union shop or some modification thereof." THE CLOSED SHOP ISSUE IN WORLD WAR II, T. T. Hammond, 21 N. C. L. Rev. 127.

In adopting the Right-to-Work Act, the General Assembly of 1947 followed the same course which was adopted in fifteen other States.

In four States closed shop agreements are now prohibited

by a vote of the people amending the respective State Constitutions.

Arizona, amendment adopted election November 1946.
 Arkansas, amendment adopted election December 1944.
 Florida, amendment adopted election November 1944.
 Nebraska, amendment adopted election November 1946.

In New Mexico the Legislature (H. J. Res. 15, Laws 1947) has approved and referred to the people for their approval a proposal to amend the Constitution of New Mexico to prohibit closed-shop agreements.

In eleven States closed-shop agreements are prohibited by legislative enactment:

Delaware, H. B. 212, Laws 1947.
 Georgia, Act. No. 140, Laws 1947.
 Louisiana, Dart's Gen. Stat., Sec. 43812.
 Maryland, Ann. Code 1939, Art. 100, Sec. 65.
 North Carolina, Chapter 328, Session Laws 1947.
 North Dakota, H. B. 151, Laws 1947.
 South Dakota, Ch. 80, Laws 1945 (Con. Amend. 1947).
 Tennessee, S. B. 367, Laws 1947.
 Texas, H. B. 27, Laws 1947.
 Virginia, Ch. 2, Laws 1947.
 Iowa, S. B. 109, Laws 1947.

Including the action taken theretofore by other States, a total of some twenty-three States have taken action to ban or regulate union security agreements. Ala. Code, tit. 26, Sec. 383 (Supp. 1943); Colo. Stats. Ann., Ch. 97, Sec. 94(6)(1)(c) (Supp. 1946); Fla. Const., Decl. Rights Sec. 12; Kan. Gen. Stat., Sec. 44-809(4) (Supp. 1945); La. Gen. Stat., Sec. 4379.6 (1939); Md. Ann. Code, Art. 100, Sec. 65 (1939); Wis. Stat., Sec. 111.06 (1)(c) (1945).

The total population of the twenty-three States which have adopted this legislation represents a substantial proportion of the total population of the United States. The action of these twenty-three States, in addition to the action taken by Congress in adoption of the Taft-Hartley Act, is such a clear demonstration of the fact that the Legislature of North Carolina was dealing with a real economic problem in enacting its Right-to-Work statute, that we need not further labor the point.

IV.

THE STATUTE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

As to the equal protection of the law clause of the Fourteenth Amendment, as pointed out in the opinion of the Supreme Court of North Carolina in this case (228 N. C. 352, 368; 45 S. E. (2d) 860), the employer-employee relationship has long been recognized as constitutional justification for legislation applicable to persons in that relative status. The North Carolina statute applies equally and alike to all employers and to all employees who are situated in like circumstances and conditions. Section 4 of the North Carolina statute, which the appellants do not contest, specifically prohibits any employer to require an employee to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment. The fact that non-union employees may indirectly benefit from the activities of union employees does not render the statute dis-

criminatory. The Act is equally applicable to all employers and employees within the State.

Barbier v. Connolly, 113 U. S. 27, 5 S. Ct. 357

Hayes v. Missouri, 120 U. S. 68, 7 S. Ct. 350

CONCLUSION

The simple truth that emerges out of this whole conflict between employer and unions is: the leaders of trade unions wish to organize the whole nation on the closed shop basis. They do not wish to do this by convincing the individual workingman that the union has benefits to offer and that it is to his interest to voluntarily join such an organization. What the leaders of trade unions really want to do is to unionize the nation by taking a short cut, the easy way, the use of compulsory and dictatorial power to create all-inclusive unionism by force. To justify this use of force, the doctrine of necessity and indispensability is invoked; and it is sought to cover any method or technique for the maintenance of union organization with the cloak of constitutional protection. By this method or rationalization, a contract which is constitutionally subject to reasonable modification and regulation is converted into action taken by an assembly, which is in turn protected by the First Amendment; and thus, a contract establishing a closed shop joins the ranks of fundamental rights which "depend on the outcome of no elections." This method of using power to organize is commented upon in an article entitled: "The Open Shop and Industrial Liberty" by Walter Gordon Merritt (The League for Industrial Rights, New York City), as follows:

"The issue, therefore, before this country, is not the question of a partial Closed Shop or a voluntary Closed

Shop system, but a national Closed Shop system maintained by conscription which, like some colossal reaper, would mow down the rights of others. It means closing the doors of industry to all but union men and closing transportation and the markets of the nation to all but union goods. It means that the great consuming public, deprived of its right of commercial suffrage, must starve or buy its sustenance and raiment from a self-sustained monopoly, artificially protected from the forces of moral or legal restraint. It means the substantial abandonment of the rights and liberties of non-union men and all non-conformists and dissenters, and the vesting in a private society of the power of commercial life and death over their fellow beings. * * * No state can tell a workman when and where he shall work or not work. That is involuntary servitude and a condition against which he is protected by the Constitution of the United States. By what warrant, then, can we place such power in the hands of private societies which deny the right of law or government to review their affairs or to define their duties and obligations? By what token of human nature can people believe that such unlimited power over the lives of individuals will be exercised by those organizations with moderation and restraint? The entire course of human history is to the contrary, and the short history of American Unionism does not modify the record."

The record of the Railway Brotherhoods clearly shows that unionism can be accomplished on a voluntary basis. These organizations were well established and their benefits so apparent that they had no need for a closed shop contract; and this existed before their status was protected by the Railway Labor Act. There is, of course, a difference between cooperative collectivism and coercive collectivism. Appellants appear to prefer the latter, and their doctrine

of necessity and indispensability would certainly have a familiar ring to the adherents of dialectical materialism. Appellants apparently do not prefer to use the Socratic method and "sell" trade unionism to working people on a voluntary basis and by persuasion and argument. This is pointed out by Stewart and Cowper in their pamphlet entitled "Maintenance of Union Membership" (Industrial Relations Counselors, New York) where it is said:

"Apparently American labor unions have not yet learned that in the long run any system of labor organization or business enterprise will survive and progress only as it performs a public service, that when unions render acceptable service to workers they will not have to rely on monopolistic practices to secure and retain members."

To follow the democratic method, of course, means that appellants must try to convince men, use hard work and intelligence so that unions will, in the end, sell themselves to workingmen. The conflict should not be settled by force excited in economic warfare, but it should be settled by democratized unions in the battleground of the human mind.

We return, however, to our major premise. The question as to whether or not the legislation adopted by the General Assembly of North Carolina enacting Chapter 328 of the Session Laws of 1947, was or was not wise, under all of the decisions of this Court and all other Courts of this country, when supported by any reason at all, was entirely a matter for the Legislature of this State to decide and not subject to any judicial review. That there were many reasons for such legislation in this and other states as well as in the enactment by Congress of the Taft-Hartley Act

is self-evident, and the conclusion cannot be avoided that the North Carolina statute was a valid exercise of the reserve power of the State under the Tenth Amendment to the Constitution of the United States:

"The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people."

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1948

No. 47

**LINCOLN FEDERAL LABOR UNION NO. 18129, AMERICAN FED-
ERATION OF LABOR, NEBRASKA STATE FEDERATION OF
LABOR, et al.,**

Appellants,

v.

**NORTHWESTERN IRON AND METAL COMPANY, DAN GIEBEL-
HOUSE, STATE OF NEBRASKA AND NEBRASKA SMALL BUSI-
NESS MEN'S ASSOCIATION**

Appeal from the Supreme Court of the State of Nebraska

No. 34

GEORGE WHITAKER, A. M. DEBRUHL, T. G. EMBLER, et al.,
Appellants,

STATE OF NORTH CAROLINA

Appeal from the Supreme Court of the State of North Carolina

**AMICUS CURIAE MEMORANDUM ON BEHALF OF THE CON-
GRESS OF INDUSTRIAL ORGANIZATIONS AND ITS AFFILI-
ATED ORGANIZATIONS**

ARTHUR J. GOLDBERG
General Counsel

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Assistant Counsel

Congress of Industrial Organizations

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I.

The Congress of Industrial Organizations and its affiliated organizations file the within Memorandum on behalf of their members because of the tremendous importance of these cases to the future of the labor movement in this country. The decisions of the courts below and the statutes which they validate strike a dangerous blow at a principle which is integral to the very functioning of a trade union in a democratic society. The statutes involved herein are typical of a group of statutes prohibiting any form of agreement between labor organizations and employers through which joining or retaining membership in a union is made a condition of employment.

The group of statutes of which the laws here under review are typical is the second wave of legislation directed at unions and their activities within recent years. The first group of statutes purported to regulate the right to strike and picket

No Memorandum is filed in Case No. 27 only because Appellants have withheld their consent.

as well as the internal affairs of unions. (See Dodd, *Some State Legislatures Go to War—On Labor Unions*, 29 Iowa Law Rev. 148 (1944), and Owens, *A Study of Recent Labor Legislation*, 38 Ill. L. Rev. 309 (1944).)

Justification for the earlier group of statutes was claimed on the ground that the various state legislatures were merely seeking to prescribe rules for the orderly conduct of labor disputes, or on the ground that they were merely seeking to impose upon unions responsibilities commensurate with the powers imputed to them. Apologists for the enactments pointed out that those laws left intact the unions' right to function and to bargain collectively.

The instant legislation contrasts sharply with the anti-labor legislation which preceded it in three important respects:

1. This legislation injects itself not into the areas of conflict but into an area of agreement. This legislation forbids employer-union agreements with respect to traditional types of union security.

2. This legislation does not seek to lay down rules with respect to the manner in which labor disputes are to be conducted but rather to weaken labor organizations by outlawing all devices which serve to make effective the right of self-organization and assembly.

3. The legislation here under review is distinguished from the earlier body of laws in that it is not regulatory but rather constitutes a flat ban upon all union security agreements.

In considering the scope of the legislation under review it is important to bear in mind that what is subject to the statutes' ban is not merely the closed shop or the union shop. All forms of union security are absolutely prohibited. This would include the preferential shop and maintenance of membership. The latter type of union security, which is characteristic of many contracts between CIO unions and employers, permits employees a certain escape period after the signing of the agreement during which they may withdraw from the union but requires all those who do not withdraw and all who later join the union to retain their membership for the duration of the agreement.

II.

Union security agreements are not novel in our industrial life, as the Economic Brief of Appellants demonstrates. They are coeval with trade unionism itself in this country. Historically, workers have made their right of association in trade unions effective by enforcing rules against working with non-members. Working people recognized long ago that unless common rules of employment could be enforced against individual employees the whole meaning and purpose of trade unionism would be set at naught. A labor organization cannot function unless it is empowered to enforce uniform rules upon all those within the bargaining unit. To deprive labor organizations of this power is to create competition between individuals which immediately breaks down the standards which the union has obtained. Employer favoritism to those resorting to individual dealing leads to desertions from the union while employer pressure on individuals to accept employment on less advantageous terms leads union members to fear displacement. In either case, individual bargaining undermines collective action and renders futile the very functioning of the labor organization.

The process of union organization and functioning is an important exercise of the right of freedom of assembly. That right cannot function effectively if labor organizations are denied the power to enter into agreements with employers for some form of union security. In the circumstances of our time union security is integral to the workers' right of free assembly. To say that workers have the right to self-organization and to the protection of trade unions but to deny them the right to render that assembly immune from traditional forms of interference would be to allow the workers' rights to function in a vacuum.

We do not here say, as Appellees contend, that legislatures are affirmatively required to see to it that labor organizations are successful in achieving their purposes. We do say, however, that a legislature may not outlaw union security agreements because the right to function as a union necessarily includes the right to negotiate union security agreements. The fact that the content of this right of freedom of assem-

bly in so far as workers are concerned has no counterpart in connection with the rights of assembly of other groups, such as businessmen, is no answer to our argument. Every civil right functions constitutionally through forms appropriate to its purpose and history. Long ago when arguments similar to those raised in support of the instant legislation were used to attack minimum wage legislation, this Court reminded us that, "Liberty in each of its phases has its history and connotation." *West Coast Hotel Co. v. Parrish*, 300 U. S. 379. To withdraw protection from the right of freedom of assembly in connection with union security agreements is to weaken the right at the very point where protection is most needed and to disfigure the "essential attributes of that liberty." *Near v. Minnesota*, 283 U. S. 697.

The basic character of the right to enter into union security agreements renders the instant legislation particularly vulnerable to constitutional attack. This is so because the legislation does not purport to deal with any of the claimed abuses in connection with the securing or administration of union security agreements. For example, the statutes do not seek to provide for "open unions" or to deal with the scope of union security agreements. They constitute a flat ban. But the teaching of this Court in a long series of cases is that legislation invading basic rights can avoid a clash with the Constitution only if it is narrowly drawn to deal with the precise evil which the legislature purports to curb. *Schneider v. State*, 308 U. S. 147; *Cantwell v. Connecticut*, 310 U. S. 296; *DeJonge v. Oregon*, 299 U. S. 353.

III.

All of the claimed justifications for the legislation, such as the "right to work," the "elimination of monopolies," and the "right not to join a union," make it clear that its basic purpose is an attack upon trade unionism. The justifications for the statutes reveal very sharply that it is the hope of the sponsors of the legislation to destroy unions as bargaining entities. This is demonstrated, for example, by the claim of "monopoly" as a basis for this legislation.

What is obviously meant by the claim of "monopoly" is that

unions strive to eliminate wage competition in areas which they organize. By insisting that the instant legislation is "anti-monopoly" legislation Appellees in effect are admitting that it is designed to prevent unions from effectively achieving their purposes and that the anti-closed shop cry is an echo of the historic open shop drive which likewise used a purported opposition to the closed shop to screen its fundamental opposition to all forms of unionism.

This echo too is heard in the claim on the part of the defenders of the legislation that it is designed to preserve the freedom of the individual to work and his "right" not to join a union. The cornerstone of the defense of the instant legislation is that individual freedom which anti-labor employers have traditionally sought to harness to anti-labor purposes.

Those who today defend the right of the individual to work and his right not to join a union are the constitutional descendants of those who vainly sought eleven years ago in the *West Coast Hotel* case to defend the freedom of the individual to contract for sweat-shop wages and more recently, in *Jones & Laughlin v. N.L.R.B.*, 301 U. S. 1, the right of the individual to work without being forced to accept union conditions. The rediscovery of the right of the individual to work or not to join a union is merely a phase of the historic process through which the semantics of freedom is used to promote and preserve inequality of bargaining power between employer and employees. As the LaFollette Committee has pointed out:

"These 'open shop' statements of the employers' associations were always phrased in a lofty vein. They opposed the closed shop, they said, because it infringed upon the liberty of the workingman to choose his employment regardless of union affiliation. They called upon the public to support them in their effort to free the average workingman from the necessity of joining unions. Sometimes, in fact, they invited unions to lay aside their demands for the closed shop, intimating that their own activities would have no further reason for existence if their invitation were accepted.

"That this purported solicitude for the freedom of the workingman from the closed union shop was not in fact the real reason for the existence of these employers' associations, nor indeed the motive for their activities, has

been amply demonstrated in previous reports of this Committee. It has there been shown that under the banner of the 'open shop' the employers' associations created an organized front against collective bargaining and sought to destroy or weaken all union organizations regardless of whether the closed shop was achieved in any given case. Illuminating analyses of the semantics of the closed and open shop and what the terms really meant to the employers' associations which used them may be found in this Committee's report on the Associated Industries of Cleveland, and in the testimony given by employers' association leaders in Los Angeles. Ostensibly the 'open shop' doctrine meant only that there should be no discrimination against non-union workers in hiring, but, in practice, adherence to the open-shop doctrine required that the employer discriminate against union workers in hiring. Said the American Plan-Open Shop Conference in 1925, 'in the true sense of the American Plan Open Shop he (the employer) cannot maintain 100 percent union crew in any department or in any craft of his business.' Attainment of this objective necessarily required discrimination against union men, and the use of labor espionage or other devices to ascertain the extent of union affiliation in the shop or plant. Collective bargaining encouraged union membership and was therefore implicitly condemned. Some employer groups, in the name of the open shop, even went so far as to forbid the hiring of union men at all. This was the case in Los Angeles at the time of the investigation by the United States Commission on Industrial Relations."

Despite this Court's decisions in *J. I. Case Co. v. N.L.R.B.*, 321 U. S. 332; *Order of Railroad Telegraphers v. Railway Express Co.*, 321 U. S. 342, and the long line of cases beginning with *Holden v. Hardy*, 169 U. S. 366,^{*} despite the repeated acknowledgement of those familiar with the realities of industrial life that individual rights theories in labor relations destroy both group and individual freedom, individual rights doctrines are again being used to justify what is basically an assault upon

^{*} *Knockville Iron Co. v. Harbison*, 183 U. S. 13 (1901), requiring cash redemption of evidence of indebtedness issued in payment of wages; *Patterson v. Bark Eudora*, 190 U. S. 169 (1903), forbidding advance payment of seamen's wages; *McLean v. Arkansas*, 211 U. S. 539 (1909), prohibiting agreements to pay miners on the basis of the weight of screened coal; *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549 (1911), prohibiting contracts limiting liability for injuries to employees; *Bunting v. Oregon*, 243 U. S. 426 (1917), limiting hours of work of factory employees; *N. Y. Central R. Co. v. White*, 243 U. S. 188 (1917), sustaining workmen's compensation laws; *West Coast Hotel Co. v. Parrish*, 300 U. S. 379 (1937), sustaining a minimum wage law.

the right of self-organization. Contentions which have long since been discredited have been revived to further a new open shop campaign.

The answer given in 1934 by Professor Robert L. Hale, of Columbia Law School, to the contentions of those who claimed that union security interferes with the right to work is as valid today as it was then:

"If a man wants to work in a steel plant, he does not just go out and work according to his own ideas about how it should be worked; he has to join an organization. Normally, in the case of a steel plant, he becomes an employee of a steel company, and then has no freedom as to the details of his work whatever; he is a non-voting member of a society. Now, if he belongs to a union in a closed-shop industry, it is perfectly true he has no freedom to work without being a member of the union, but he has a little more freedom through the brotherhood of his union against the restraint imposed upon him by the employer.

"Now of course, any system of organization is liable to have faults at times. . . . Government of any sort has certain evils, or may have at particular times, but the only alternative is anarchy, where the evils would be much greater. If he is subject to be governed by the rules of his union he presumably has a little more control over what these rules are than if he is governed solely by the rules laid down by his employer."

Heavily relied upon for support of the legislation are statutes outlawing "yellow-dog" contracts or preventing discrimination against employees because of membership in labor organizations. Invoking a deceptive even-handedness the sponsors of the instant legislation insist that if legislatures may outlaw agreements between employer and employee in which the employee undertakes not to join a union they may likewise outlaw agreements between unions and employers requiring employees to join unions. But the justification for "yellow-dog" and related legislation does not support the instant legislation. On the contrary, that legislation is grounded in precisely the same considerations which prevent interferences with union security agreements:

1. That legislation acquires its validity from the basic prin-

ciple that individual employees lack true freedom in dealing with their employers because of a lack of equal bargaining power. By outlawing union security agreements, the instant legislation will promote inequality of bargaining power.

2. That legislation is designed to promote equality of bargaining position and to neutralize employer abuses of economic power in labor relations. The instant legislation deals with arrangements mutually agreed upon between employers and bona fide labor organizations freely chosen as representatives of the employees. This legislation will revive and invite employer abuse of economic power in labor relations by eliminating union security agreements, the historic bulwark against such abuse.

3. That legislation is part of an historic body of federal and state laws which have as their objective the protection of the right of freedom of assembly and self-organization. The legislation under review seeks to destroy the effectiveness of freedom of assembly and self-organization.

* * *

This legislation does not originate in highly industrialized states with extensive experience in the operation of union security agreements. On the contrary it originates in states primarily rural in character. Its purpose is not to correct or to eliminate demonstrated abuses flowing from the entering into or enforcement of union security agreements. Its purpose is the weakening and indeed the destruction of labor organizations. It is a part of the historic open shop drive which seeks to discard and outlaw fundamental and time-sanctioned adjustments which characterize mature labor relations and substitute in their stead the law of the jungle.

We are convinced that this Court will not permit the carefully evolved and deliberately reached solutions of basic labor problems which are reflected in union security agreements to become the victims of this new open shop crusade.

Respectfully submitted,

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